90-1118

No. 90-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HEARST CORPORATION,

Petitioner,

—v.—

IOWA DEPARTMENT OF FINANCE AND REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below err in upholding an Iowa use tax that exempts "newspapers" and "shoppers guides," but no other periodicals, notwithstanding the free press and equal protection guarantees of the United States Constitution, because the court considered this selective exemption to be an appropriate government subsidy that is rationally related to literacy enhancement and administrative economy?

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IN THE

Supreme Court of the United States

October Term, 1990

No. 90-____

THE HEARST CORPORATION,

Petitioner,

v.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner, The Hearst Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa, entered in this case on September 19, 1990. This case raises issues related to those in a case argued before this Court on January 9, 1991.[1]

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Iowa entered September 19, 1990 is reported at 461 N.W.2d 295 (Ia. 1990). (1a.)[2] The order of the Supreme Court of Iowa denying rehearing, entered October 18, 1990, is unreported. (72a.)

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1 *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202, *cert. granted*, 111 S. Ct. 41 (1990) (Nos. 90-29, 90-38) ("*Medlock*").

2 Citations to materials reprinted in the Appendix to this Petition appear as "____ a."

The Ruling of the Iowa District Court for Polk County, AA1401, dated November 6, 1989, is unreported. (25a.)

The Proposed Order of the Administrative Law Judge dated July 6, 1988, is unreported. (44a.) The Order of Director Upon Review of Proposed Order dated September 12, 1988, is unreported. (42a.)

JURISDICTION

This petition seeks review of the judgment of the Supreme Court of Iowa, that was entered September 19, 1990. (1a.) A timely petition for rehearing was denied by the Supreme Court of Iowa by order entered on October 18, 1990. (72a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States are set forth in Appendix F. (73a.)

The pertinent sections of the Iowa Code, Sections 422.43, 422.45, 423.2 and 423.4 contained in Volume II, pages 2084, 2086, 2096 and 2097, Iowa Code (1977), are set forth in relevant part in Appendix F. (73a-74a.)

The pertinent rule of the Iowa Department of Revenue and Finance, 730 Iowa Admin. Code 18.42(1), is set forth in relevant part in Appendix F. (74a.)

STATEMENT OF THE CASE

Among its various activities, The Hearst Corporation ("Hearst") distributes publications throughout the United States.[3] This petition concerns Hearst's constitutional challenge, under the First and Fourteenth Amendments, to a discriminatory assessment of use taxes by the State of Iowa upon publications sold by Hearst to subscribers in that state.

a. The Iowa Sales/Use Tax Scheme

The State of Iowa imposes a sales tax upon gross receipts from the retail sale of tangible property within the state but *exempts* from that tax: "[g]ross receipts from the sales of newspapers, free newspapers or shoppers guides . . ." § 422.45(9), Iowa Code. (73a-74a.) The state also imposes a parallel tax on the "use" of tangible property within Iowa but incorporates the same exemption for "newspapers . . . or shoppers guides." § 423.4, Iowa Code. (74a.)

The statutory term "newspapers" is defined in an implementing rule promulgated pursuant to the tax statute by the Iowa Department of Revenue and Finance (the "Department"), as follows:

> [A] newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest.

730 Iowa Admin. Code 18.42(1), as amended (74a).

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3 Consistent with what Hearst understands to be the intent of Rule 29.1 of the Court, Hearst states the following. Hearst owns more than a 50% interest in Condé Nast and National Magazines Distributors, Ltd., Ingersoll Consolidated Mining Company, Santa Eulalia Mining Company and Sonoma Mines Company. Also, Hearst owns directly or indirectly lesser interests in other privately held entities, as well as in additional ventures that are themselves privately held but in which ventures other entities that may be publicly traded also hold interests. Among the latter ventures are Hearst/ABC Video Services, Hearst/ABC News Services, Lifetime Productions, Inc., ESPN, Inc. and New England Cable News Services.

There is no other exemption for periodicals from the Iowa sales or use taxes.

b. The Tax Assessment

In April 1984 the Department issued a Notice of Assessment to Hearst, asserting that Hearst was liable under the Iowa use tax for subscription sales of 14 periodicals to Iowa residents.[4] The period at issue was January 1, 1978 through December 31, 1982, during which Hearst had not collected the tax from its Iowa subscribers.

c. Administrative Proceedings and Appeal

As provided under Iowa law, Hearst filed a protest to the Notice of Assessment, leading to an administrative hearing. From the outset, Hearst asserted among other grounds that the Iowa sales/use tax scheme violates the freedom of press and equal protection provisions of the United States Constitution, because the scheme improperly discriminates among written periodicals. (*See* 59a, 64a, setting forth the questions raised by Hearst in the administrative proceedings.)

In a proposed order, the administrative law judge rejected Hearst's arguments and ruled that imposition of the use tax as well as penalties was appropriate. The proposed order determined specifically that "Protester has failed to show . . . that the Protester has been deprived of any constitutional rights as guaranteed by the United States . . . Constitution" (71a). Upon Hearst's appeal, the Director of the Department affirmed and adopted that proposed order in its entirety. (42a-43a.)

Hearst sought review of this administrative determination in the Iowa district court, pursuant to the state's Administra-

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4 The following publications of Hearst were involved: Colonial Homes, Cosmopolitan, Country Living, Good Housekeeping, Harper's Bazaar, Motor, House Beautiful, Motor Boating & Sailing, Popular Mechanics, Science Digest, Sports Afield, Town & Country, Connoisseur, and Redbook. Each of these was published monthly, except Colonial Homes which was published bimonthly.

tive Procedure Act. Again, Hearst asserted its constitutional freedom of press and equal protection arguments against what it believed to be impermissible, selective taxation. (*See* 27a, detailing the questions raised before the district court.) Rejecting Hearst's arguments, the district court affirmed the Department's determination. The court expressly ordered that "the tax on Hearst's publications does not violate the First Amendment, [and] does not violate equal protection . . ." (41a).

Hearst appealed this order to the Supreme Court of Iowa, where Hearst continued to urge the unconstitutional discriminatory nature of the tax.

d. The Decision Below

The Iowa Supreme Court affirmed in all respects, premising its appellate analysis upon a "presumption of constitutionality" (8a) for the use tax statute.

The Iowa Supreme Court concurred with the Department's determination that the Hearst publications were not exempt "newspapers" under the Iowa tax statute. The court noted that the Hearst publications "targeted a smaller audience [than newspaper readership] that was interested in a specific subject matter" and were published monthly or bimonthly in a format and on a paper different from newspapers. (7a.) The court also observed that Hearst in advertisements had characterized the subject publications as "magazines." *Id.*

Rejecting Hearst's constitutional arguments, the Iowa Supreme Court deemed unpersuasive Hearst's reliance upon precedents of this Court. (10a.) The court sought to distinguish this Court's holding in *Minneapolis Star & Tribute v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ("*Minneapolis Star*"), because the Iowa scheme "differentiates not between media sources of the same type, but between media sources of different types" (9a). The court below read *Minneapolis Star* as relating only to taxation schemes that differentiate among "media sources of the same type" and target a

small group of publishers. (14a-15a.) In the latter respect the court stated that most retail transactions in Iowa involving tangible personal property were subject to the sales/use tax, the "only deviation" being that newspapers and shoppers guides are exempt from taxation, while other publications are not. (11a.)

The Iowa Supreme Court also found inapplicable this Court's opinion in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) ("*Arkansas Writers' Project*"). The Iowa court read that opinion as turning upon the existence of a tax exemption "impermissibly directed at a publication's content" (15a). The court acknowledged that content is indeed "a consideration" in applying the Iowa use tax exemption (13a) and that other publications, such as *Barron's*, had been denied that exemption based solely upon their content. (7a-8a.) The court opined, however, that the Iowa scheme focused on a publication's "form and frequency" as the primary factors for applying the exemption and, as such, complied with this Court's teaching in *Arkansas Writers' Project*. (13a.)

The Iowa Supreme Court concluded that the statutory classifications are valid if they bear a "rational relation to a legitimate governmental purpose," which standard the court found "easily met in challenges to tax statutes" (15a, 17a). The court rejected Hearst's contention that the use tax exemption could be justified only if necessary and narrowly drawn to satisfy a compelling government interest. (15a.) Relying upon this Court's decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Iowa court stated that the state could properly subsidize, through a tax exemption, "newspapers" and "shoppers guides" but no other periodicals. (13a-14a.)

The court found adequate Iowa's rationale that, by subsidizing the price of newspapers, the tax exemption "enhanc[ed] the general knowledge and literacy of its citizenry" (17a-18a). The court did not comment in this respect on the statute's exemption of "shoppers guides." The court

also accepted the state's rationale that it would be uneconomical for child news carriers to collect and remit the proper amount of sales and/or use taxes. (18a.) The court did not explain how this rationale justified the statute's exemption of newspaper sales through subscription or at newsstands.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Creates a Direct Conflict Among the States Over the Meaning of the United States Constitution

The opinion of the court below, upholding as rational an Iowa sales/use tax scheme that exempts "newspapers" and "shoppers guides," but no other periodicals, conflicts squarely with repeated decisions of the courts of last resort in other states.

1. The Supreme Court of Tennessee voided a sales tax imposed on magazines, but not on newspapers, because the tax violates the First Amendment. The Tennessee court found the scheme to involve "a tax that burdens rights protected by the First Amendment [which] cannot stand unless the burden is necessary to achieve an overriding governmental interest" and concluded the State had failed to show such a compelling need. *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251, 252, *petition for cert. filed*, 59 U.S.L.W. 3193 (1990), and *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, *petition for cert. filed*, 59 U.S.L.W. 3193 (1990) (the "Tennessee case").

2. The Supreme Court of Florida held that a sales tax that applied to magazines, but not to newspapers, violated the First Amendment. The court found the differential to be unconstitutional, based on "first amendment concerns . . . [arising] when a state tax scheme differentiates between different types of periodicals, *i.e.*, taxing sales of magazines while exempting sales of newspapers." *Department of Revenue v. Magazine Publishers of Am., Inc.*, 565 So.2d 1304, 1307, *petition for cert. filed sub nom. The Miami Herald*

Publishing Co. v. Department of Revenue, 59 U.S.L.W. 3440 (1990) (the "Florida case").

3. The Supreme Court of Oklahoma nullified a state tax scheme that exempted sales of periodicals only when made by carrier (rather than by subscription) or when the sales price did not exceed seventy-five cents. The Oklahoma court concluded that relevant constitutional standards enunciated by this Court "are meant for broad and general application to the press" and, applying them, invalidated the subject "differential tax treatment of the press." *Dow Jones & Co. v. Oklahoma ex rel. Tax Comm'n*, 787 P.2d 843, 846, 847 (Okla. 1990) (the "Oklahoma case").

The Tennessee, Florida and Oklahoma courts all found controlling the constitutional principles enunciated by the Court in *Minneapolis Star* and *Arkansas Writers' Project*. In those two cases, the Court taught that discriminatory state sales/use taxation of the press burdens First Amendment rights when a tax scheme treats the press differently from other enterprises or applies unevenly as among groups within the press. In such circumstances, the Court has said, the disparate tax treatment can be sustained only if it is both necessary and narrowly drawn to achieve a compelling state interest and regardless of legislative intent or the government "subsidy" arguably involved. *E.g.*, *Arkansas Writers' Project*, 481 U.S. at 227-31.

Each of the three state court decisions cited above held that the differential tax treatment of periodicals could be justified only by a showing of a compelling need to accomplish an overriding government interest; rejected attempts by states to apply a lesser "rational relationship" approach; and, in the Florida case in particular, refused to accept the state's argument that the newspaper exemption was an appropriate government subsidy.

By contrast, here, the Iowa Supreme Court found this Court's teaching to be narrowly limited to the facts before it; permitted a rational relationship justification for the tax exemption of "newspapers;" and accepted the government

subsidy argument as an appropriate rationale for the Iowa tax scheme.

The Iowa court was aware that its opinion conflicted directly with those of the highest courts in other states but regarded those decisions as being "without reasoned analysis" (18a). The court instead referred (9a) to a terse dictum by the Supreme Court of Arkansas in *Medlock*, a case subsequently accepted for review by this Court (*see* n.1 *supra*), to the effect that the Arkansas court was "unwilling to hold that all mass communications media must be taxed in the same way."[5]

The net result is patchwork application among the states of fundamental constitutional principles, that can be resolved only by the Court.

B. The Opinion Below Decides a Constitutional Issue that Has Not Been, but Should Be, Settled by the Court

The Iowa Supreme Court answered an important First Amendment question left open by this Court in *Arkansas Writers' Project*, and the Iowa court did so in a fashion that contravenes this Court's express holdings concerning First Amendment mandates.

The question this Court left unanswered was "whether a distinction between different types of periodicals [*i.e.* newspapers and magazines] presents an additional basis for invalidating the sales tax, as applied to the press." 481 U.S. at 233. The Court did not need to reach this question because it already had held the state sales tax differential unconstitutional for other reasons.

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5 *Medlock*, 785 S.W.2d at 204. The *Medlock* court, however, did hold that it was unconstitutional to impose a state sales tax upon cable television but not on satellite television, because they delivered substantially the same service. *Id.* In still another case, the New York Court of Appeals, summarily affirming an intermediate court opinion in that state, invalidated a state tax levy because it differentiated between the print media and the broadcast media. *McGraw-Hill, Inc. v. State Tax Comm'n*, 75 N.Y.2d 852 (1990), *aff'ing on opinion below*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (3d Dep't 1989).

The open question is of continuing importance. The Court has left no doubt that differential taxation of the press "suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585. This is all the more so when *content* is a criterion for imposing differing tax burdens upon periodicals.

The Court specifically has stated that selective taxation of periodicals on the basis of content "is particularly repugnant to First Amendment principles." *Arkansas Writers' Project*, 481 U.S. at 229. Contrary to the apparent rationale of the decision here below (14a-15a), the Court has not limited this principle in any way to discrimination among periodicals that concededly are of the "same type." When a state scheme for classifying "types" of periodicals for disparate taxation inquires into their content, the resulting differentiation is no less "repugnant" to the First Amendment.

The Iowa tax scheme effected just such an improper distinction. As reflected by the implementing rule of the Iowa Department, the exemptive term "newspaper" in the Iowa statute is inherently content-based. The Department's rule confirms that a periodical can be classified as exempt from Iowa use taxation only if it "contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest," and is also published "daily, weekly, or at some other regular and usually short interval". 730 Iowa Admin. Code 18.42(1). (74a.) As among many periodicals published with the same regularity, therefore, content provides the sole basis for selective taxation, and in other circumstances content remains a specified criterion.

Accordingly, in deciding that the Hearst periodicals at issue did not qualify for the use tax exemption, the Iowa Department determined that these periodicals "contain detailed articles of special interest to a particular group of people . . . [but] do not contain 'news' of current events on a variety of topics of general interest" (56a). The administrative decision also pointed out that the periodicals were published

monthly or bimonthly and were not in the form usually found in newspapers. *Id.*

The Iowa Supreme Court conceded the distinction made on the basis of content but brushed it aside as merely "a consideration" (13a). In doing so, the court below contravened the unambiguous, repeated teaching of this Court: " 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.' " *Arkansas Writers' Project*, 481 U.S. at 230 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984)).

Further, despite this Court's requirement that any tax scheme suspect under the First Amendment be justified by a showing that the scheme is "necessary to serve a compelling state interest and is narrowly drawn to effect that end" (*id.* at 231), the court below required Iowa simply to satisfy a lesser "rational relationship" test. The court accepted the state's arguments that the tax differential (a) "enhanc[ed] the general knowledge and literacy of its citizenry," and (b) was administratively economical because collection of taxes by child news carriers would be "highly impractical." (17a-18a.)

Far from a narrowly drawn response to a compelling state interest, the state's justification did not satisfy even the rational relationship test. Assuming that enhancing the general knowledge and literacy of citizens is an appropriate governmental goal, the design of the Iowa tax statute—expressly exempting "shoppers guides" as well as newspapers—hardly furthers that end. Also, whatever the economics of collecting taxes through route carriers, the Iowa statutory exemption applies to all sales of "newspapers," whether through subscription, newsstand, carrier or otherwise.

The plain failure of the court below to heed the Court's general admonitions concerning disparate taxation of the press in answering an important question left open by the Court is another reason for review.

C. The Issues Raised By the Decision Below Are of National Significance

Numerous states have tax schemes that differentiate in imposing burdens on periodicals. Absent a clear answer from the Court on the issues raised in this case, continued state-by-state litigation is a virtual certainty, with the consequent, increasing potential for still more divergent applications of federal constitutional principles.

As the Iowa Attorney General, counsel for respondent in this case, explained in an *amicus* brief recently filed with the Court in support of certiorari for the Tennessee case, decisions concerning these issues have "far-reaching" ramifications that "affect many if not all of the states" and on which state "courts are in hopeless conflict."[6] We agree. The "hopeless conflict," however, was created by the decision here below.

The Iowa Supreme Court—alone, to our knowledge, among state courts of last resort which have decided the issue—has held selective exemption of "newspapers" from sales/use taxes that burden other periodicals to be consistent with the United States Constitution.

The Court has granted certiorari in the *Medlock* case, and petitions for certiorari also have been filed in the Florida case and in the Tennessee case. Although related to the issues here, the *Medlock* case may not squarely pose the issues decided below and on which the interstate judicial conflict continues. We urge the Court to take the opportunity presented by this case to settle definitively the issues presented herein.

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6 "Brief of *Amici Curiae* in Support of Petition for Certiorari by the State of Iowa, and the States of American Samoa [etc.]," (pp. 5, 9), filed in *Commissioner of Tennessee v. Newsweek, Inc.*, (Docket No. 90-273).

CONCLUSION

This case presents important, national issues concerning effectuation of fundamental First Amendment rights. Because of the decision here below, state judiciaries are now in disarray over the application of the Court's teaching as to discriminatory taxation of the periodical press. A Writ of Certiorari should issue to review this decision.

Dated: January 10, 1991

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U.S. Const. Amend. I

U.S. Const. Amend. XIV, Section I

Iowa Code Sections 422.43, 422.45, 423.2, 423.4

730 Iowa Admin.Code 18.42(1)

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 268/89-1863

Filed September 19, 1990

HEARST CORPORATION,

Appellant,

—vs.—

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellee.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Appeal from trial court order affirming the Iowa Department of Revenue and Finance's assessment of sales and use tax on Hearst's publications based on their classification as "magazines" rather than being tax exempt as "newspapers". AFFIRMED.

John V. Donnelly and Harold N. Schneebeck of Brown, Winick, Graves, Donnelly, Baskerville, and Schoenebaum, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Lucille M. Hardy, Assistant Attorney General, for appellee.

Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Andreasen, JJ.

SNELL, J.

Appellant, The Hearst Corporation (Hearst), appeals from an adverse ruling of the district court. The district court affirmed the decision of the Iowa Department of Revenue and Finance (department), holding that the taxed publications of Hearst are not "newspapers" as that undefined term is used in Iowa Code section 422.45(9)(1977) and, therefore, do not qualify for an exemption to Iowa's sales and use tax; that the tax on Hearst's publications is not in violation of the freedom of speech and press provisions of the First Amendment to the United States and Iowa Constitutions; that the tax does not violate the equal protection provisions of the United States and Iowa Constitutions; that the tax is not in violation of the due process provisions of the United States and Iowa Constitutions; that the tax does not violate the commerce clause to the United States Constitution; that Hearst is not entitled to the award of attorneys' fees; and that Hearst is liable for the penalty authorized pursuant to Iowa Code section 423.18 (1983).

I. *Background Facts and Proceedings.*

Hearst is a Delaware corporation with its principal place of business located in New York, New York. Hearst, among other things, is engaged in the publication and sale of various publications to subscribers and vendors throughout the United States. There are fourteen Hearst publications involved in this case, each of which has a large subscription circulation throughout the United States. These publications are Colonial Homes, Cosmopolitan, Country Living, Good Housekeeping, Harper's Bazaar, Motor, House Beautiful, Motor Boating and Sailing, Popular Mechanics, Science Digest, Sports Afield, Town and Country, Connoisseur, and Redbook.

Between October 1, 1978, and December 31, 1982 (the period in question), Hearst solicited subscription orders by United States mail for its publications from Iowa residents. All subscription solicitations by Hearst originated outside of the State of Iowa, were accepted or rejected by Hearst out-

side of the State of Iowa, were printed outside of the State of Iowa, and were sent by second class mail directly to Iowa subscribers from points originating outside of the State of Iowa. All of the publications in question were published monthly, except for Colonial Homes, which was published bimonthly. During the period in question Hearst collected no Iowa use tax from its Iowa subscribers.

On April 25, 1984, the department issued a notice of assessment for retail use tax relating to the Hearst Corporation's alleged retail use tax liability. This assessment reflects the department's determination that the use tax was due from Hearst by reason of Hearst's failure to collect use tax from its Iowa subscribers for the various publications published by Hearst and sold by subscription to Iowa residents. Hearst filed a timely protest to the assessment with the hearing officer of the department.

On October 27, 1987, a hearing was held before an administrative law judge. In a proposed order, issued July 6, 1988, the administrative law judge upheld the department's assessment for retail use tax. On July 21, 1988, Hearst appealed the proposed order to the director of the department. The director affirmed the proposed order and adopted it in its entirety. Thereafter, on September 23, 1988, Hearst filed a timely petition for judicial review of the director's order with the clerk of the district court for Polk county. The matter was then submitted to the Iowa District Court for Polk County on September 26, 1989, on the record made before the administrative law judge, written briefs, and oral arguments. The district court issued its ruling on November 6, 1989, holding adversely to Hearst and Hearst appeals. We affirm.

II. *Scope of Review.*

The court may review the decision of the district court pursuant to Iowa Code section 17A. 20 (1989), which provides that:

> An aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final

> judgment of the district court under this chapter by appeal. The appeal shall be taken as in other civil cases, although the appeal may be taken regardless of the amount involved.

Furthermore, pursuant to Iowa Code section 17A.19(8):

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action if substantial rights of the petitioner have been prejudiced because the agency action is:
>
> a. In violation of constitutional or statutory provisions;
>
> b. In excess of the statutory authority of the agency;
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> . . . .
>
> e. Affected by other error of law;
>
> . . . .
>
> g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

The scope of this review is at law, not de novo, therefore we are limited to those issues considered in the record made before the agency. *Hussein* v. *Tama Meat Packing Corp.*, 394 N.W.2d 340, 341 (Iowa 1986); *Taylor* v. *Iowa Dep't of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985).

Hearst challenges the agency action based on the above enumerated provisions.

III. *The Taxation Scheme.*

Under Iowa's sales and use taxation scheme, a sales tax is imposed on the retail sales of magazines while retail sales of "newspapers" are exempt from taxation. *See* Iowa Code §§ 422.43, 422.45(9)(1977); *see also* Iowa Code § 423.4(4) (1977).

Iowa Code section 422.43 (1977) provides in part that:

> There is hereby imposed a tax of three percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users . . . .

The Code, pursuant to section 422.45(9)(1977), further provides that:

> There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it the following:
>
> 9. Gross receipts from the sales of newspapers, free newspapers or shoppers guides and the printing and publishing thereof.

Likewise, the "use" of such tangible personal property is exempt from Iowa use tax by virtue of Iowa Code section 423.4(4)(1977) which also provides in part that:

> The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this chapter:
>
> 4. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 422.45 . . . .

When interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent. *Iowa Dep't of Revenue* v. *Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 614 (Iowa 1976). Our goal then, is to ascertain that intent and, if possible, give it effect. *Isaacson* v. *Iowa State Tax Comm'n*, 183 N.W.2d 693, 695 (Iowa 1971). To ascertain the legislative intent we must look to what the legislature said, rather than what it should or might have said. *State* v. *Hesford*, 242 N.W.2d 256, 258 (Iowa 1976). Words are given their ordinary meaning unless defined differently by the legislature or possessed of a particular and appropriate meaning in law. *Id.* However,

we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. *Doe* v. *Ray*, 251 N.W.2d 496, 501 (Iowa 1977). Weight should be given to the department's interpretation of the statutes, particularly when they are of long standing, but the court is not bound by that interpretation. *Sommers* v. *Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 473 (Iowa 1983).

It is the contention of the Hearst Corporation that its publications fall within the purview of the "newspaper" exemption of Iowa Code sections 422.45(9)(1977) and 423.4(4) (1977). Otherwise, Hearst argues, the tax is discriminatory and cannot withstand constitutional challenges.

IV. *Are the Subject Publications "Newspapers?"*

Whether the Hearst publications may be considered "newspapers" depends upon the meaning of that term as it is used in Iowa Code section 422.45(9)(1977), a tax exemption statute that must be strictly construed against the taxpayer and in favor of taxation. *Goergen* v. *State Tax Comm'n*, 165 N.W.2d 782, 786 (Iowa 1969). The term "newspaper" is not defined in the statute. In fact, the department was without a rule defining the term until January 28, 1981, when it adopted the following definition:

> A newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that generally contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest.

701 Iowa Admin. Code 18.42(1)(1981) (amended 1982 striking "generally" from definition); *see also Webster's Third New Int'l Dictionary* 1524 (1976) (defining "Newspaper" in exactly the same terms).

Webster's Third New International Dictionary defines a "magazine" as "a periodical containing special material directed at a group having a particular hobby, interest or profession . . . ." *Id.* at 1357. The dictionary also defines a "periodical" as "a magazine or other publication of which

the issues appear at stated or regular intervals—usu. used of a publication appearing more frequently than annually but infrequently used of a newspaper." *Id.* at 1680.

Hearst itself has made a distinction between its publications, apparently based on common parlance. Its advertisements state that "Hearst is more than 135 businesses including magazines, broadcasting, newspapers, books, business publishing and cable communications." Hearst lists the publications in question here as "magazines" and separately enumerates the newspapers it publishes. These distinctions, that track with the dictionary meanings, must have been accepted by Hearst as having sufficient clarity of meaning for use in communicating with the general public.

The administrative agency also found the Hearst publications in question to be different from newspapers in that they were printed monthly or bimonthly. They were more costly, had a substantially longer useful life than newspapers, and targeted a smaller audience that was interested in a specific subject matter. Also, their format was different as was the paper used in its printing.

We agree that the administrative agency had substantial evidence to support its finding based on these facts and the ordinary meaning of these terms that the Hearst publications are properly classified as "magazines" or "periodicals" and not "newspapers". To classify the Hearst publications as "newspapers" would be to place a strained, impractical or absurd construction upon the language of the statute. *Doe*, 251 N.W.2d at 501.

Hearst contends that this finding, that its publications are not "newspapers" based on form, is illusory and that their publications are in fact being unconstitutionally discriminated against based on their content. In support of its contention, Hearst offered several exhibits including such publications as Barrons and The Sporting News. Hearst argues that their publications meet all of the noncontent criteria of the "newspaper" exemption of Iowa Code section 422.45(9)(1977), but yet are taxed as nonnewspapers, that the distinctions being drawn by the statute are in fact based upon the content of

the publication and not its form. We find no merit to this contention.

Although their status is not before this court, publications such as Barrons and The Sporting News, have been classified by the department as nonnewspapers for purposes of the Iowa Code section 422.45(9)(1977) tax exemption. We observe that although a publication may contain some of the noncontent criteria that distinguish a "newspaper" from other publications that are taxable, it may still not qualify under the "newspaper" exemption. Our review of the facts of this case points to this conclusion.

The agency properly found numerous differences between the Hearst publications at issue and newspapers based on their noncontent factors, as herein enumerated. In addition, there is no evidence in the record to support a finding that the legislature meant to include "magazines" or "periodicals" within its definition of "newspaper." We may glean from the fact that since the legislature adopted the Webster definition of "newspaper" for purposes of determining what publications qualify for the Iowa Code section 422.45(9)(1977) tax exemption, that it was also the intention of the legislature to exclude from that exemption all other publications—such as "magazines" or "periodicals" as defined by Webster's—since not specifically set out in the statute as exempt. Accordingly, we hold the Hearst publications do not qualify for the Iowa tax exemption.

V. *Hearst's Constitutional Challenges.*

At the outset we must recognize the presumption of constitutionality of these statutes. The rule is well settled that "a statute will not be declared unconstitutional unless it clearly, palpably, and without doubt infringes the constitution." *Zilm* v. *Zoning Bd. of Adjustment*, 150 N.W.2d 606, 609 (Iowa 1967). We have also said in various ways that every reasonable doubt must be resolved in favor of constitutionality. *Hansen* v. *Haugh*, 149 N.W.2d 169, 174 (Iowa 1967).

A. *Freedom of Speech, or of the Press.*

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const. amend. I. This amendment, of course, is made applicable to the several states through the Fourteenth Amendment. Section 7 of article I of the Iowa Constitution similarly provides. The language of the first amendment clearly "does not prohibit all regulation of the press." *Minneapolis Star & Tribune* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 581, 103 S. Ct. 1365, 1369, 75 L. Ed. 2d 295 (1983). In fact, it is beyond dispute that some publications may be subjected to generally-applicable economic regulations by the states and the federal government without creating constitutional problems. *Id.* Problems arise, however, when "a discriminatory tax on the press burdens rights protected by the first amendment." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 227, 107 S. Ct. 1722, 1726, 95 L. Ed. 2d 209 (1987) (footnote omitted). The Court makes it clear in both *Minneapolis Star* and *Arkansas Writers' Project* that a scheme of taxation which differentiates between media sources of the same type will not pass muster under the first amendment unless a compelling justification for the differential treatment exists. For example, a sales tax on cable television service but not on decoders for unscrambling satellite television broadcasts was held to violate first amendment protections. *Medlock* v. *Pledger*, 785 S.W.2d 202, 204 (Ark. 1990). Here the court also declined to apply first amendment principles so broadly as to hold that all mass media must be taxed in the same way. The argument that newspapers and magazines, that were not taxed, should be categorized with cable television service, was not directly at issue before the court but was inferentially spurned. In the case at bar, unlike *Medlock*, we are faced with a statutory scheme of taxation that differentiates not between media sources of the same type, but between media sources of different types. *See also Austin* v. *Michigan Chamber of Commerce*, ____ U.S. ____, ____, 110 S. Ct. 1391, 1401, 108 L. Ed. 2d 652 (1990), where the

compelling reason of preventing corruption in the political arena justified the statutes's restrictions.

Appellant Hearst vigorously contends that the distinction between types of media sources is inconsequential and that the Court's decisions in *Minneapolis Star* and *Arkansas Writers' Project* nevertheless control in the present case. We disagree.

In *Minneapolis Star*, the Minnesota Legislature imposed a special "use tax" on the cost of paper and ink products consumed in the production of a publication. This legislation was later amended to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication a $4,000 annual tax credit. The net effect of these provisions was that only a handful of publishers were actually subject to the ink and paper tax. *Minneapolis Star*, 460 U.S. at 578-79, 103 S. Ct. at 1368.

The Supreme Court, in rejecting the state's argument that the tax was valid, found two distinct forms of discrimination. First, as opposed to a generally-applicable economic regulation, such as Iowa's, to which the press can legitimately be subject, the Minnesota Legislature created a special tax that applies only to certain publications protected by the first amendment. *Id.* at 581, 103 S. Ct. at 1370. Second, the tax was tailored in such a way that it singled out and targeted a small group of newspapers. *Id.* at 591, 103 S. Ct. at 1375. In holding that such a differential and discriminatory scheme of taxation is invalid under the first amendment, the court noted that:

> A power to tax differently, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened,

> and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Id. at 585, 103 S. Ct. at 1371-72 (citations omitted). The Court also found great potential for abuse if it recognized a power in the state to tax selected members of the press. *Id.* at 592, 103 S. Ct. at 1375. *Cf. Village Publishing Corp.* v. *North Carolina Dep't of Revenue*, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 710 (1985) (Justice White dissenting from dismissal of appeal for want of a substantial federal question); *Department of Revenue* v. *Magazine Publishers of America, Inc.*, ____ S.E.2d ____ (Fla. 1990).

In contrast to the Minnesota scheme, the Iowa structure does not create a special tax that applies only to certain publications protected by the first amendment, nor is it tailored in such a way that it singles out and targets small groups of publications. Iowa's tax is a generally-applicable retail sales tax whereby gross receipts from retail sales of tangible personal property are taxed. *See* Iowa Code § 422.43 (1977). In addition, in order to reach those retail sales that cannot be subjected to state sales tax, Iowa imposes a complimentary generally-applicable retail use tax whereby the use in Iowa of tangible personal property is taxed. *See* Iowa Code § 423.4(4)(1977); *Dain Mfg. of Iowa* v. *Iowa State Tax Comm'n*, 237 Iowa 531, 534, 22 N.W.2d 786, 788 (Iowa 1946). Thus, while there are a number of sales and use tax exemptions in Iowa, *see generally* Iowa Code section 422.43 (1977), most retail transactions involving tangible personal property for use or consumption in the state of Iowa are taxed. *See Lee Enters., Inc.* v. *Iowa State Tax Comm'n*, 162 N.W.2d 730, 754-55 (Iowa 1969) (holding that Iowa sales and use tax law, as amended, is of general application). The only deviation from this general scheme of taxation is that "newspapers" and "shoppers guides" are granted an exemption from the tax, while other publications are not. And since the tax does not target any small groups of publishers, either

directly or indirectly, the tax satisfies the standards set by *Minneapolis Star*.

The issue of selective taxation of publications was once again addressed in *Arkansas Writers' Project*, where the Court examined an Arkansas sales tax scheme which taxed general interest magazines, but exempted newspapers and "religious, professional, trade and sports journals . . ." *Id.*, 481 U.S. 224, 107 S. Ct. at 1724. The net effect of the Arkansas tax scheme was that only a few Arkansas magazines would ever pay any sales tax.

The Court again placed great emphasis on the potential for abuse by the state if it was to recognize a power to tax selected members of the press. *Id.* at 228, 107 S. Ct. at 1727. The Court also found that both types of discrimination identified in *Minneapolis Star* could be established even where there is no evidence of an improper censorial motive, *Minneapolis Star*, 460 U.S. at 592, 103 S. Ct. at 1375, "because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." *Arkansas Writers' Project*, 481 U.S. at 228, 107 S. Ct. at 1727. Because the Arkansas sales tax scheme treated some magazines less favorably than others, it suffered from the second type of discrimination identified by the Court in *Minneapolis Star*. Additionally, the *Arkansas Writers' Project* case involves a much more distressing use of selective taxation than *Minneapolis Star* because the basis upon which the state differentiated between the different magazines is particularly repugnant to first amendment principles: namely, that a magazine's tax status depended entirely upon its content. *Id.* The Court also noted that this scheme completely contradicts the strictures of the first amendment which, "above all else, . . . means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972)). "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with

the First Amendment's guarantee of freedom of the press." *Id.* at 1728.

Relying on *Arkansas Writers' Project*, Hearst would have this court believe that Iowa Code section 422.45(9)(1977), which exempts "newspapers" and not "magazines" or "periodicals" from Iowa's sales and use taxation scheme, is facially invalid because the exemption, in substance, is based upon the content of a publication, rather than other facially valid noncontent criteria. We find little merit to this argument.

The facts of the case before us are markedly different from those in *Arkansas Writers' Project*. While the classification of the writing as "news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest" is a consideration, the focus is not on the content of the journalism. Rather, the form and frequency of the publication are the primary factors for determining whether a publication qualifies for the Iowa sales and use tax exemption. Hearst, or anyone else for that matter, is free under the rule to publish and sell whatever content they choose and to choose whatever form they desire. The Iowa law does not scrutinize the content, but rather the form and frequency of publication. There is no censorial threat, motive, or element imposed by the rules in this case. Because the form of a publication is a noncontent based consideration, the Iowa statute complies with the standards set forth by the Supreme Court in *Arkansas Writers' Project*.

The Iowa tax scheme finds further support in *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), where the Supreme Court upheld the denial of a tax exemption for a nonprofit organization engaged in lobbying activities even though veterans' organizations that lobbied on legislation received the exemption. In upholding this differential treatment of taxpayers, based solely upon whether or not a particular taxpayer chose to exercise his freedom of speech, the court noted that "tax exemptions and tax deductibility are a form of *subsidy* that is administered through the tax system," *Id.* at 544, 103 S. Ct. at 2000 (emphasis added) (reaffirming that legislative

tax classifications may be broad and that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). *Id.* at 547, 103 S. Ct. at 2002.

The legislative classification in Iowa that distinguishes between "newspapers" and "magazines" or "periodicals" is supported by *Regan* wherein the Court stated that:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Regan, 461 U.S. at 547, 103 S. Ct. at 2002 (quoting *Madden* v. *Kentucky*, 309 U.S. 83, 87-88, 60 S. Ct. 406, 407-08, 84 L. Ed. 2d 590 (1940) (footnotes omitted)). While the government may not deny a benefit to an organization which decides to exercise its constitutional rights, the government is not required to subsidize those constitutional rights exercised. *Id.* at 545, 103 S. Ct. at 2001. We agree with the district court in concluding that the Iowa Legislature may subsidize one form of publication (*i.e.*, "newspapers"), but is not required by the first amendment to also subsidize other forms of publications as long as it has a rational noncontent basis for doing so. Furthermore, because the Iowa law does not discriminate between media sources of the same type which would subject

only a handful of publications to the state sales and use tax as in *Minneapolis Star* and *Arkansas Writers' Project*, and because the Iowa exemption is not impermissibly directed at a publication's content, as in *Arkansas Writers' Project*, the Iowa tax scheme which exempts "newspapers," but not "magazines" or "periodicals," from the generally-applicable Iowa retail sales and use tax is not the type of suspect tax that violates the first amendment. The decision of the district court is therefore affirmed on this ground.

B. *Equal Protection of the Law.*

The Fourteenth Amendment to the Constitution of the United States provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV. Section 6 of article 1 of the Iowa Constitution places substantially the same limitations upon the state legislation as does the equal protection clause of the fourteenth amendment. *See* Iowa Const. art. 1, § 6; *see also City of Waterloo* v. *Selden*, 251 N.W.2d 506, 509 (Iowa 1977).

Our first step in analyzing the equal protection question is to determine whether a rational basis test or a more stringent standard should be applied. *Rudolph* v. *Iowa Methodist Medical Center*, 293 N.W.2d 550, 557 (Iowa 1980).

Hearst contends that because it is being deprived of equal protection of the law under the Iowa statutes, and because its first amendment rights are being infringed upon, the classifications are subject to strict judicial scrutiny. An example of the application of this standard is *Austin* v. *Michigan Chamber of Commerce*, ____ U.S. ____, ___, 110 S. Ct. 1391, 1401, 108 L. Ed. 2d 652 (1990), where the Court considered a Michigan statute which prohibited a nonprofit corporation from using its general treasury funds to support a political candidate. Even under strict scrutiny the Court held the equal protection clause was not violated.

Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. *Regan*, 461 U.S. at 547, 103 S. Ct. at 2001. Statutes are sub-

jected to a higher level of scrutiny if they interfere with the exercise of a fundamental right such as freedom of speech or the press. *Id.* at 547, 103 S. Ct. at 2001-02. However, in tax matters even more than in other fields, the legislature possesses the greatest freedom in classification. *Id.*, 103 S. Ct. at 2002; *Dickinson* v. *Porter*, 35 N.W.2d 66, 72 (Iowa 1948), *appeal dismissed*, 338 U.S. 843, 70 S. Ct. 88, 94 L. Ed. 2d 515 (1949).

The situation in the present case, though factually distinguishable, closely parallels the situation in *Regan* on a doctrinal level as applied to this issue. The Iowa Legislature, through its state tax provisions, has chosen to subsidize newspapers and shoppers guides and no other forms of publication. This is similar to the subsidy granted veterans' organizations in *Regan*. In treating the tax exemption as a form of subsidy, the *Regan* Court stated that:

> The Court of Appeals nonetheless held that "strict scrutiny" is required because the statute "*affect[s]* First Amendment rights on a discriminatory basis." 219 U.S. App. D.C., at 130, 676 F.2d, at 728 (emphasis supplied). Its opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. *This is not the law.* Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combating teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.

Id., 461 U.S. at 548-49, 103 S. Ct. at 2002 (emphasis added).

In finding that strict scrutiny did not apply, the *Regan* Court specifically stated that "[t]hese are scarcely novel principles. We have held in several contexts that a legislature's

decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549, 103 S. Ct. at 2003. The constitution does not require that the government remove all obstacles in the path of the exercise of a person's rights. *Id.* at 549, 1013 S. Ct. at 2003. Where governmental subsidies are not aimed at the suppression of dangerous ideas, its power to encourage actions deemed to be in the public interest is necessarily far broader. *Id.* at 550, 103 S. Ct. at 2003.

In both *Regan* and the case at bar, the legislature has chosen to subsidize one group's rights while not subsidizing the other. And since, as previously discussed, we found no suppression of Hearst's fundamental rights, strict scrutiny does not apply. The law in Iowa is that a challenged classification will not be subject to strict scrutiny unless it impinges upon a fundamental right or disadvantages an inherently-suspect class. *State* v. *Wehde*, 258 N.W.2d 347, 352 (Iowa 1977). Consequently, we apply a rational basis standard in deciding whether Iowa's statutory scheme of taxation in fact violates Hearst's guaranteed right to equal protection.

Under a rational basis standard, a legislative classification will survive judicial scrutiny if it bears a rational relation to a legitimate governmental purpose. *Regan*, 461 U.S. at 547, 103 S. Ct. at 2001; *Veach* v. *Iowa Dep't of Transp.*, 374 N.W.2d 248, 249 (Iowa 1985). The rational basis standard is easily met in challenges to tax statutes. *Klein* v. *Iowa Dep't of Revenue & Fin.*, 451 N.W.2d 837 (Iowa 1990). In the case before us the department has presented sufficient evidence to persuade this court that the legislative classification at issue serves legitimate state interests.

The department asserts two state interests that are furthered by the Iowa tax scheme which we consider to be legitimate. First, is the interest the State has in encouraging the reading of newspapers and thereby enhancing the general knowledge and literacy of its citizenry. By subsidizing the price of newspapers through the "newspaper" exemption the State makes newspapers available to those of even moderate to low means; an action deemed to be in the public interest. With this exemption, newspapers will remain an inexpensive

source of public information which most people will be able to afford.

Secondly, the State has a legitimate interest in maintaining administrative economy. The majority of sales and collections on the sale of newspapers are made by child carriers. It would be uneconomical and highly impractical if the tax department was forced to monitor, regulate and audit the hundreds of carriers who sell and collect for newspapers on a daily and/or weekly basis. To expect these child carriers, the majority of whom are between the ages of ten and twelve, to correctly figure, collect, and remit the proper amount of tax due is ludicrous. We find that the legislature was reasonable in concluding that the state interest would be better served by exempting these particular sales.

Hearst further contends that the "newspaper" exemption is fatally over-broad and that if the problem is carrier sales, the Iowa tax exemption should have been narrowly tailored to only deal with that specific problem. We find little merit in this contention. Hearst's argument is not compatible with the *Regan* decision and, even assuming that it is, the resulting statutory exemption would cause the differential taxation of same source media as condemned by the Supreme Court in both *Minneapolis Star* and *Arkansas Writers' Project*. Uniform treatment of same source media advances the principles and standards set out by the Supreme Court in *Minneapolis Star* and *Arkansas Writers' Project* and forestalls any content discrimination claims by members of the same media.

We agree with the department that there is no iron-clad "all or nothing" rule for the taxation, or exemption from taxation, of speech to be found in the constitution. Such a rule has been espoused in several state court cases but without reasoned analysis. *See Jones & Co* v. *State Ex Rel. Tax Comm'n*, 787 P.2d 843 (Okla. 1990); *Louisiana Life, Ltd.* v. *McNamara*, 504 So. 2d 900 (La. App. 1 Cir. 1987). Furthermore, it was not embraced by the Supreme Court in *Arkansas Writers' Project* and is inconsistent with *Regan*. We find that the rational basis standard is the proper constitutional test to be applied in this case, and because the Iowa tax law

satisfies that standard, Hearst's equal protection claim must be rejected.

C. *Due Process of Law.*

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law;". Section 9 of article I of the Iowa Constitution similarly provides.

All of the provisions of the First Amendment to the Constitution of the United States have been made applicable to the several states through the Fourteenth Amendment, including freedom of speech and of the press. *Gitlow* v. *New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630, 69 L. Ed. 1138 (1925). Hearst contends that if it is not being deprived of its fundamental rights under the first amendment, Iowa Code section 422.45(9)(1977) is so vague, indefinite, and uncertain that it cannot be determined by generally-acceptable rules of construction what publications qualify for the exemption within the parameters of that section.

The Supreme Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause when its language does not convey a sufficiently definite warning as to proscribed conduct when measured by common understanding or practice. *Arnett* v. *Kennedy*, 416 U.S. 134, 158-64, 94 S. Ct. 1633, 1646-47, 40 L. Ed. 2d 15 (1974). However, a noncriminal statute is not unconstitutionally vague where its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its proscriptions. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607, 93 S. Ct. 2908, 2913, 37 L. Ed. 2d 830 (1973). Only when persons must necessarily guess at the meaning of a statute and differ as to its application must it be declared invalid. *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926). The root of the vagueness doctrine is a rough idea of fairness. *Colton* v. *Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957, 32 L. Ed. 2d 584 (1972).

When confronted with vagueness challenges we have pointed out that a statute meets the constitutional test if its meaning is fairly ascertainable by reference to similar statutes, other judicial determinations, and to the dictionary, or if the words themselves have a common and generally-accepted meaning. *Iron Workers Local No. 67* v. *Hart*, 191 N.W.2d 758, 772 (Iowa 1971). Even if more specific language could be devised, it is apparent that, in the absence of criminal sanctions a statute requires less literal exactitude to comport with due process; unless the statute clearly, palpably, and without doubt infringes the constitution it will be upheld. *Lee Enter., Inc.* v. *Iowa State Tax Comm'n*, 162 N.W.2d 730, 739 (Iowa 1969).

Both on its face and as applied to the facts in this case, the term "newspaper" passes constitutional muster. Hearst itself has classified, for public consumption, its various publications as either "newspapers" or "magazines." We also find that even before the department formally adopted a definition for the term "newspaper" on January 28, 1981, the meanings of the terms of the statute were sufficiently clear that Hearst could have fulfilled its prescriptions. The Department was correct in finding that the term "newspaper" as used in Iowa Code section 422.45(9)(1977) is not so vague, indefinite, and uncertain, as to deprive Hearst of its liberty or property interests without due process of law.

D. *The Commerce Clause.*

Article I section 8 clause 3 to the Constitution to the United States provides that "The Congress shall have the power . . . to regulate commerce . . . among the several states . . . ." However, state legislation designed to serve legitimate state interests and applied without discriminating against interstate commerce does not violate the commerce clause even though it may affect interstate commerce. *Consolidated Freightways Corp. of Delaware* v. *Kassel*, 475 F. Supp. 544, 547 (S.D. Iowa 1979), *aff'd*, 612 F.2d 1064, probable jurisdiction noted 446 U.S. 950, 100 S. Ct. 2915, *aff'd*,

450 U.S. 662, 101 S. Ct. 1309, *cert. dismissed*, 455 U.S. 329, 102 S. Ct. 1496.

Hearst contends that under the commerce clause the practical effect of the Iowa Code section 422.45(9)(1977) "newspaper" exemption is to discriminate in favor of local (Iowa) print media and against foreign (non-Iowa) source print media. This results in discrimination against interstate commerce in favor of local commerce in the fight for the subscriber dollar. The district court found no merit to this argument and neither do we.

The Supreme Court stated in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329, 97 S. Ct. 599, 607, 50 L. Ed. 2d 514 (1977) (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458, 79 S. Ct. 357, 362, 3 L. Ed. 2d 421 (1959)), that "[n]o state, consistent with the commerce clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." However, the Court has repeatedly held that the commerce clause is not violated when state taxation affects a particular classification, as long as the class distinctions are not based on any in-state or out-of-state criteria. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 617, 101 S. Ct. 2946, 2953, 69 L. Ed. 2d 884 (1981); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126, 98 S. Ct. 2207, 2214, 57 L. Ed. 2d 91 (1978); *Morman Mfg. Co.* v. *Blair*, 437 U.S. 267, 277, 98 S. Ct. 2340, 2346, 57 L. Ed. 2d 197 (1978) (n.12); *see also Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 104 S. Ct. 3049, 3056, 82 L. Ed. 2d 200 (1984), where an illegal discrimination favoring local industries was found.

The Iowa tax scheme does not base the "newspaper" exemption upon any in-state or out-of-state criteria. It is the form of the publication, not the source of the commerce, that determines taxation or exemption under the Iowa tax law. Newspapers will be exempted whether published in the State of Iowa or outside the state. In this regard, any of the Hearst Corporation's "newspapers," whether published outside the state and sold within the state or published within the state and sold outside the state, will qualify for the tax

exemption. Likewise, all of the Hearst Corporation's "magazines" or "periodicals," whether published within the state and sold outside the state or published outside the state and sold within the state, will be subjected to the Iowa tax. The tax is not aimed at interstate commerce as such. It applies to all taxpayers for services rendered within the state.

There has been no showing that the "newspaper" tax exemption is at all based on the protection of local business, or that the tax on magazines places an undue burden on interstate commerce. *Lee Enters. Inc.* v. *Iowa State Tax Comm'n*, 162 N.W.2d 730, 743-52 (Iowa 1968). Hearst's commerce clause claim is therefore rejected.

V. *Recovery of Attorneys Fees.*

Hearst argues that because it has raised constitutional claims that it is entitled to recover its reasonable attorneys' fees in this matter pursuant to 42 U.S. Code sections 1983 and 1988. 42 U.S. Code section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. Code § 1988 provides in relevant part that:

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

Hearst relies upon these sections and the case of *Blessum* v. *Howard County Board of Supervisors*, 295 N.W.2d 836 (Iowa 1980), to persuade us that Iowa courts have accepted jurisdiction over section 1983 claims and have entertained those claims brought under that section. *Id.* at 846. Hearst's reliance on this case is misplaced. The *Blessum* case, unlike the present case, was a suit against a county government, did not involve the state or one of its departments, and did not involve a claim regarding te assessment and collection of taxes. Therefore, we find this case totally irrelevant to the present situation.

We are not here faced with a 42 U.S. Code section 1983 action. This case involves judicial review, pursuant to Iowa Code section 422.55 (1977), of a contested case based on an administrative hearing authorized by Iowa Code sections 423.16 and 422.54(2)(1977). None of these statutes authorize, nor do they even mention, the recovery of a reasonable attorneys' fee. As a matter of fact, 42 U.S. Code section 1988 specifically states that a reasonable attorneys' fee will only be awarded to the prevailing party. Since Hearst is not the prevailing party it is not entitled to the award of a reasonable attorneys' fee. We also note that our State Tort Claims Act, section 25A.14(2), 1989 Code, does not apply to authorize any claim arising in respect to the assessment or collection or any tax or fee. Therefore, the decision of the district court is affirmed on this issue.

VI. *The Penalty for Failure to Collect and Remit the Use Tax due.*

Iowa Code section 423.18(1)(1977) provides for the assessment of a penalty for failure to timely collect and remit use tax due unless it can be shown that failure to remit the tax on or before the date due was due to "reasonable cause." *Atlantic Bottling Co.* v. *Iowa Dep't of Revenue*, 385 N.W.2d 565, 569 (Iowa 1986); *Armstrong*, v. *Iowa Dep't of Revenue*, 320 N.W.2d 623, 629 (Iowa 1982).

A taxpayer may establish "reasonable cause," as that term is used in our tax penalty statutes, by establishing that it did

all that ordinary business care and prudence would demand. *Armstrong*, 320 N.W.2d at 629. What constitutes "ordinary business care and prudence" is a determination to be made on the facts of each particular case. *Id.* The burden is on the taxpayer, however, to establish reasonable cause by a preponderance of the evidence. *Atlantic Bottling Co.*, 385 N.W.2d at 569. Because the department found that Hearst had not met its burden of proof, we will overturn the department on this issue only if Hearst established reasonable cause as a matter of law. *Id.*

The record does not establish that Hearst's failure to collect and remit the use tax was in any way consistent with ordinary business care and prudence. The only rationale offered by Hearst as a reason for failing to collect and remit the use tax, was that in its opinion the tax was discriminatory and in violation of the Constitution.

Hearst did not notify the department that it considered the tax to be unconstitutional as applied to the sale of its magazines. It did not seek a declaratory ruling as to the validity of the tax, nor did it remit the tax and subsequently seek a refund based upon the invalidity of the statute. Hearst merely presented its unsupported opinion that the law was unconstitutional. Hearst raised its constitutional objections as a defense to the tax assessment for the first time only after the department had audited Hearst. Ordinary business care and prudence require that the taxpayer follow the law. Consequently, Hearst has not established reasonable cause in this case.

The district court's decision is affirmed.

AFFIRMED.

APPENDIX B

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

AA 1401

THE HEARST CORPORATION,

Petitioner,

—vs.—

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Respondent.

RULING

This is an action by the petitioner, The Hearst Corporation (hereinafter Hearst), for judicial review from an adverse decision by the respondent Agency, Iowa Department of Revenue and Finance (hereinafter Agency). The Agency found that Hearst failed to show an exemption from a use or sales tax for sales of its publications, or that Hearst has been deprived of any constitutional rights, or that reasonable cause exists for waiver of the penalty. From said decision, the petitioner has filed this administrative appeal.

The Court, after reviewing the entire record made before the Agency, hearing the statements and arguments of the attorneys, reviewing the briefs filed by the parties, and being fully advised, States:

1. The Court has jurisdiction over the subject matter of this action and over the parties hereto.

2. This is an application for judicial review of an adverse decision in a contested case after all administrative remedies have been exhausted.

STATEMENT OF THE CASE

On April 25, 1984, the Agency issued a Notice of Assessment for Retail Use Tax relating to Hearst's alleged retail use tax liability for the period January 1, 1978, through December 31, 1982. This assessment reflects the Agency's determination that use tax was due from Hearst by reason of Hearst's failure to collect use tax with respect to fourteen of Hearst's publications, sold by subscription to Iowa residents. Hearst denies that it was responsible for collection and payment of the tax.

On October 27, 1987, a hearing was held before Elizabeth Duncan, Administrative Law Judge. In a proposed order, issued on July 6, 1988, the ALJ upheld the Agency's position. Hearst filed an appeal to the Director of the Iowa Department of Revenue and Finance. The Director's order affirmed the decision of the ALJ and adopted her findings in its entirety. On September 23, 1988, Hearst filed its Petition for Judicial Review.

Hearst is a Delaware Corporation with its principal office in New York, New York. Its business includes magazines, broadcasting, newspapers, books, business publishing, and cable communications. The fourteen publications at issue in this case were sold on a national level. Hearst solicited subscription orders from residents of Iowa and also sold the publications to Iowa wholesalers who in turn sold to retailers within the state.

All of the fourteen publications were published on a monthly basis, with the exception of Colonial Homes, which was published bi-monthly. Hearst has a separate organization that handles newspapers (Hearst Newspapers Group) and a separate organization that handles magazines (Hearst Magazine Division). All of the fourteen publications at issue here were held out as magazines by Hearst. Hearst publishes fourteen other publications that it holds out as newspapers.

ISSUES

1. Whether Hearst's publications qualify as "newspapers" and, therefore, qualify under Section 422.45(9), the exemption to sales and use tax.

2. Whether the tax on Hearst's publications is a violation of the freedom of speech and press provisions of the Iowa and United States Constitutions.

3. Whether the tax on Hearst's publications is a violation of the equal protection provisions of the Iowa and United States Constitutions.

4. Whether the tax on Hearst's publications is a violation of the due process provisions of the Iowa and United States Constitutions.

5. Whether the tax on Hearst's publications is a violation of the commerce provision of the United States Constitution.

6. Whether Hearst is entitled to attorney fees pursuant to 42 U.S.C. Section 1983 and Section 1988.

7. Whether a penalty for late payment of the tax was properly imposed upon Hearst.

DISCUSSION

The Court may review the Agency decision in accordance with the standards specified in Iowa Code Section 17A.19(8). Hearst has essentially relied on three grounds: (1) The Agency decision was affected by errors of law, (2) The decision was in violation of constitutional or statutory provisions, and (3) The decision was unreasonable, arbitrary, capricious, or characterized by an abuse of discretion. *Id.* The Court's review is limited to the record made before the Agency. *Hussein v. Tama Meat Packing Corp.*, 394 N.W.2d 340 (Iowa 1986).

I.

The first issue is whether the Hearst publications are "newspapers", as that term is used in Iowa Code Section 422.45(9). Section 422.45(9) provides an exemption from sales and use tax for:

> "Gross receipts from the sales of newspapers, free newspapers or shoppers guides and the printing and publishing thereof, and envelopes for advertising."

The term "newspaper" is not defined in the statute. With relevance to this case, the Agency had no rule defining the term from January 1, 1978, to January 28, 1981. Effective on the latter date, the Agency adopted the following definition:

> "A newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regularly and usually short interval and that generally contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest."

Iowa Administrative Code 701-18.42(1). On May 19, 1982, the Agency amended the rule by striking the word "generally".

When interpreting statutes, the polestar is legislative intent. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). The intent is shown by what the legislature said, rather than what it should or might have said. *State v. Peterson*, 347 N.W.2d 398 (Iowa 1984). The Court must avoid legislating in its own right and avoid placing upon statutory language a strained, impractical, or absurd construction. *Doe*, 251 N.W.2d at 501. Weight should be given to an administrative agency's interpretation, but the Court is not bound by that interpretation. *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983).

There are several cases which attempt to define "newspaper", two of which are similar to the case at bar. The first case found that publications such as Life, Time, Newsweek, and United States News were not newspapers under the tax

statute. *Gasson v. Gay*, 49 So.2d 525 (Florida 1950). The statute in *Gasson* stated that newspapers were exempt from sales tax, while magazines were not. The Court stated that words of common usage, when used in a statute, should be construed in their plain and ordinary signification. *Id.* at 526. The Court used an ordinary definition to find that the appellant's publications were not newspapers and therefore were subject to the tax. *Id.* However, one distinction between *Gasson* and the present case is that in *Gasson*, the statute specifically excluded magazines from exempt status, while in the Iowa statute, magazines are not mentioned.

In another case, the relevant tax statute was construed to exempt the subject magazines as they were found to be tangible personal property used "for the primary purpose of conveying news". *Time, Inc. v. Hulman*, 201 N.E.2d 374 (Illinois 1964). The preamble to the statute made it clear that newspapers were exempted while books and phonographic records were not. Magazines were not mentioned. The Court found that the statute did not authorize any discrimination between newspapers and news magazines and, therefore, appellant's magazines were exempt from the tax. *Id.* at 378. The distinction between *Time, Inc.* and the present case is that the statute in *Time, Inc.* exempted publications "for the primary purpose of conveying news" while the Iowa statute exempts "newspapers" specifically.

Of the definitions of "newspapers" used by the Courts, all identify two common characteristics: (1) It is published at short, regular intervals, usually not exceeding a week and (2) It routinely reports a myriad of topics so that it appeals, at least in part, to a wide spectrum of the general public. *Caldor, Inc. v. Heffernar*, 440 A.2d 767 (Connecticut 1981). Often, dictionary definitions are used. *Id.* Webster's defines newspaper as "A paper that is printed and distributed usually daily or weekly and that contains news, articles of opinion, features, and advertising". Webster's Ninth New Collegiate Dictionary 796 (1986). This is very similar to the definition given by the Agency in this case.

Based on cases and other definitions of "newspaper", this Court finds that Hearst's publications do not fit the definition and, thus, are not exempt from the tax.

First, the dictionary and case definitions state that the publication is printed at short intervals, usually daily or weekly. Monthly is never mentioned as period of time. The Hearst publications were printed monthly, except for Colonial Homes, which was printed bi-monthly.

Secondly, the Hearst publications do not contain "news" of current events on a variety of topics of general interest. The Agency found that each publication contains feature articles in particularly narrow fields. These articles are not of current interest and are no more relevant in the month of issuance than in prior or subsequent months.

It should be noted that the "news" requirement must be interpreted broadly to avoid being used as a content requirement. A content requirement is dangerous because it could be used by the Agency to decide tax status on a discriminatory basis. News is defined generally as "A report of recent events". Webster's at 796. Such a requirement can be applied objectively to exclude some publications, for example, a magazine that printed only stories not relating to current events. In this case the Hearst publications do not contain news, as expressed above. However, the Court does not rely on this requirement in finding that the publications are not newspapers.

What appears to be more important is the form of the publications. A "newspaper" is defined in dictionaries as "A *paper* that contains . . .". Therefore, some significance should be given to the word "paper". An ordinary and reasonable meaning of the "paper" portion of the definition of newspaper would be a low-cost, sheet form of the publication. This is part of an ordinary and common meaning to the word newspaper. Such a distinction appears to be impliedly recognized by the Court in *Time, Inc.*, which refers to Time and Life as "newsmagazines" rather than "newspapers". *Time, Inc.*, 201 N.E.2d at 378. Therefore, this Court finds that the form of the publication is an important criteria in determining whether the newspaper exemption applies. This

criteria is recognized by the Agency regulation and supports the finding of no exemption in this case.

In addition, there is no evidence to suggest that the legislature meant to include magazines within the definition of newspaper. Statutes exempting property from taxation should be strictly construed in favor of the taxing power, and the words in such statutes should be given a reasonable, natural, and practical meaning. *K-Mart v. South Dakota Department of Revenue*, 345 N.W.2d 55 (South Dakota 1984). Ordinarily, magazines and newspapers are considered to be distinct classes of publications. Therefore, if magazines were classified as "newspapers", the language of the statute would be given a strained and impractical interpretation.

For the reasons stated above, the Court finds that the Hearst publications do not fit within the "newspaper" exemption in Section 422.45(9). Therefore, the decision of the Agency is affirmed on this ground.

II.

The second issue is whether the imposition of the Iowa use tax on the Hearst publications serves as a denial of freedom of speech and of the press. Hearst claims that the differential tax treatment between magazines and newspapers places a burden on the First Amendment rights of magazine publishers. The Agency claims it is permissible for the State to give beneficial tax treatment to one segment of the media without giving the same treatment to the whole media.

The leading case in this area is *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1983). *Minneapolis Star* involved a Minnesota use tax on the cost of paper and ink products consumed in the production of a publication. There was an exemption to the use tax for the first $100,000 worth of ink and paper. As a result, only 11 of the 388 newspapers in the state incurred a tax liability. Of that collective liability, the Minneapolis Star paid two-thirds. The Supreme Court stated two reasons in finding that the tax violated the First Amendment. The first

reason concerns Minnesota's special treatment of the press in its tax scheme. *Minneapolis Star*, 460 U.S. at 581. The Court noted that the state can subject newspapers to generally applicable economic regulations without causing constitutional problems. *Id.* Therefore, if the state had a general sales tax that applied to various retail goods, including newspapers, the tax would be constitutional. *Id.* at 583. However, if a special tax is placed on the press, First Amendment implications must be considered. *Id.* at 582. This is because a special tax creates a danger of governmental attempts to interfere with the press by the implementation of weakening and crippling taxes. *Id.* at 585. Since the press has such an important role in providing public information, the state must show a compelling state interest when applying a special tax. *Id.* Since Minnesota could not show a compelling state interest, the tax was found unconstitutional. *Id.* at 590.

The second reason concerns the effect of the tax, which targeted a small group of newspapers. Because of the $100,000 exemption, few publishers had to pay the tax. The Court stated that a tax that is tailored so it singles out a few members of the press presents a potential for abuse by the state. *Id.* at 592. Therefore, a compelling state interest must be shown. *Id.* Since Minnesota had no compelling interest, the statute failed on this ground also. *Id.* at 592-593.

In the case at bar, the Iowa statute does not cause the type of constitutional problems found in *Minneapolis Star*. First, the Iowa tax involves a sales and use tax that is generally applied to businesses. It is not a special tax on the press as was found in *Minneapolis Star*. The only distinction from the general tax was that newspapers were granted an exemption from the tax, while other publications were not.

Second, the tax does not target a small group of publishers. The distinction is between newspapers and other publications. Since all non-newspaper publications are subjected to the tax, it cannot be said that it only affects a small group of the press. Therefore, the tax satisfies the standards set by *Minneapolis Star*.

Another factor to consider is whether content plays a role in determining the tax status of a publisher. *Arkansas Writ-*

ers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722 (1987). This case involved a statute which applied a general sales tax to publishers. There was an exemption for newspapers and "religious, professional, trade and sports journals and/or publications printed and published within this state". 107 S.Ct. at 1724. The effect of the statute was that, at most, only three publishers paid any tax at all. Therefore, it was clear that the burden of the tax fell on a small group of publishers. *Id.* at 1727. However, the Court extended its analysis to consider the question of content discrimination.

In *Arkansas Writers'*, content was a basis to determine tax status because the Commissioner determined whether the magazine was a religious, professional, trade or sports journal. *Id.* at 1728. This completely contradicts the First Amendment which, above all else, means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Id.* at 1727. Such official scrutiny of the content of a publication as a basis for imposing a tax is incompatible with the First Amendment. *Id.* at 1728.

In the present case, there is no problem with the tax status being based on content. The Iowa statute provides an exemption for newspapers. This exemption is based on the form of the publication, rather than the subject matter. Since form is a non-content consideration, it is impossible for the Agency to discriminate based on the ideas or subject matter within the publication. Therefore, the statute complies with the standard set in *Arkansas Writers'*.

The Iowa tax scheme is also supported by the decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997 (1983). This case dealt with the tax status of contributions to tax-exempt organizations. Internal Revenue Code Section 501(c)(4) provides that contributions to organizations under that section were tax deductible. Section 501(c)(4) stated that the tax deductions were not allowed if the organization used the contributions for lobbying purposes. The Supreme Court found that the tax deduction status operated as a subsidy to organizations which did not lobby. 461 U.S. at 544. While the government cannot deny a

benefit to an organization because it exercises a constitutional right (such as lobbying), the government does not have to subsidize constitutional rights. *Id.* at 545. The Court found that it was proper to refuse the tax deduction status for contributions which finance lobbying efforts. *Id.* at 546.

Similarly, the Iowa statute operates as a form of subsidy in favor of newspapers. The general sales and use tax applies to all businesses. The exemption for newspapers has the same effect as a grant from the government. The tax scheme shows that the Iowa Legislature simply chose not to subsidize non-newspaper publications. Hearst can still exercise its constitutional rights; it just will not be subsidized for it.

Hearst has provided one case that is directly analogous to the one at bar. In *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (Louisiana Court of Appeals 1987), a Louisiana appellate court found that a general sales tax statute could not exempt newspapers without also exempting magazines. *Louisiana Life*, 504 So.2d at 905. The Court found that an exemption to some members of the press while denying it to others is facially discriminatory and within the interpretation of *Minneapolis Star*. *Id.*

This reading of *Minneapolis Star* by the Louisiana Court of Appeals is inaccurate. *Minneapolis Star* dealt with a tax that affected a small group of newspapers. 460 U.S. at 592. The Court's concern was that the targeting of a small group might lead to government abuse of members of the group. *Id.* In the *Louisiana Life* case, and in the present case, there is no small group which is being "abused". Rather, it is an entire segment of the media that is merely being subjected to a generally applicable sales tax. Therefore, this Court is unpersuaded by the *Louisiana Life* decision.

Based on the above cases, and the facts of this case, the sales and use tax imposed on Hearst does not violate the First Amendment. Therefore, the decision of the Agency is affirmed on this ground.

III.

The third issue is whether the imposition of the Iowa sales and use tax on the Hearst publications violates equal protection. The first step is to decide whether strict scrutiny or rational basis is the proper test.

Generally, statutory classifications are valid if they bear a rational relationship to a legitimate governmental purpose. *Regan*, 461 U.S. at 547. Statutes are subjected to strict scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech or of the press. *Id.* Ordinarily, legislatures have broad latitude in creating classifications and distinctions in tax statutes. *Id.*

The *Regan* case also involved an equal protection claim. In that case, contributions to most tax-exempt organizations were not tax deductible if the organization used the contribution for lobbying efforts. *Id.* at 544. However, an exception was made so that contributions would be tax deductible, even if used for lobbying, if the group was a veterans' organization. *Id.* at 548. In treating the tax deduction status as a form of subsidy, the Court stated:

> The Court of Appeals nonetheless held that strict scrutiny is required because the statute "affects" First Amendment rights on a discriminatory basis. 219 U.S.App.D.C., at 130, 676 F.2d, at 728 (emphasis supplied). Its opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. This is not the law. Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under Cammarano, such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combating teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of

> the second statute would not make the first statute subject to strict scrutiny.

Id. at 548-549.

In finding that strict scrutiny did not apply, the *Regan* Court stated that the legislature's decision not to subsidize the exercise of a fundamental right does not infringe upon the right. *Id.* at 549. The greatest concern of the Constitution is that the government may attempt to block important rights. *Id.* at 550. It does not require that the government remove all obstacles in the path of the exercise of a person's rights. *Id.* Therefore, where government subsidies are not aimed at the suppression of dangerous ideas, its power to encourage actions deemed to be in the public interest is much broader. *Id.*

In the present case, the situation closely parallels the situation in *Regan*. The Iowa Legislature has, through its tax provisions, chosen to subsidize one form of the press over other forms. This is similar to the subsidy of the right to lobby to veterans' organizations. The right to lobby and the freedom of the press are both rights protected by the First Amendment. In each case the legislature has chosen to subsidize one group's rights, while not subsidizing other groups. Since, as discussed in part II of this decision, there is no suppression of a fundamental right, strict scrutiny does not apply. Therefore, this Court must use the rational basis test in judging whether the statute violates equal protection.

The rational basis test states that a statute will survive scrutiny if it bears a rational relation to a legitimate governmental purpose. *Regan*, 461 U.S. at 547. In *Regan* the subsidy in favor of veterans' groups survived the test. The Court noted the country's long-time policy of compensating veterans and providing them with advantages. *Id.* at 551. This policy was found to be legitimate. *Id.*

The Agency asserts two legitimate state interests that were furthered by the Iowa tax scheme. The first is that the state could encourage the reading of newspapers and, thus, enhance the general knowledge of its citizenry of current events and other subjects by subsidizing the price of newspa-

pers. The second is that it would be unworkable to collect the tax on newspapers because a major portion of the sales are by carrier. Both of these interests are legitimate and satisfy the rational basis test.

The first interest concerns the state's desire to help provide a low-cost source of public information to its citizens. Creating an informed citizenship is certainly a legitimate state interest. The Iowa tax scheme is rationally related to this interest as it gives a break on the price of newspapers. In this way, newspapers remain a cheap source of public information which most people will be able to afford to purchase.

The second interest concerns the unworkability aspect of applying the tax to newspapers. The main reason is that many newspapers are "sold" through child carriers, who are deemed independent contractors and would be responsible for collecting the tax. In a similar case, the Supreme Court of North Carolina found that it would be a great burden to expect children to comply with the procedures involved in collecting a sales tax on newspapers. *Matter of Assessment of Additional North Carolina and Orange County Use Taxes against Village Publishing Corporation for the Period from April 1, 1972, through March 31, 1978*, 312 N.C. 211, 322 S.E.2d 155, 163 (1984). The North Carolina Court found that the legislature was reasonable in concluding the state interest was better served by exempting these particular sales. *Matter of Assessment*, 322 S.E.2d at 163. This Court agrees with the finding in the North Carolina case and finds that the Iowa tax scheme satisfies the rational basis test.

Since rational basis is the proper constitutional test, and the Iowa tax law satisfies the test, Hearst's equal protection claim is rejected. Therefore, the Agency decision is affirmed on this ground.

IV.

The fourth issue is whether Hearst is being deprived of its liberty and property without due process of law. Hearst argues that Section 422.45(9) is so vague, indefinite, and uncertain that it cannot be determined by rules of construc-

tion what publications are included within the parameters of that section. Essentially, Hearst is saying that the term "newspaper" gives no guidance.

The constitutional test for vagueness is that a statute, which either forbids or requires the doing of an act, in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 127 (1926). "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the chance of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review." *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244 (1984). In the present case, it cannot be said that Section 422.45(9) is unconstitutionally vague.

As discussed in part I of this Ruling, "newspaper" is perfectly capable of being understood by persons of common intelligence. The common usage of "newspaper" is ordinarily recognized to exclude magazines such as the publications at issue in this case. Also as discussed in part I, there is no content test in deciding whether a publication is a newspaper. Therefore, this case is different than *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), where tax status was determined by a content evaluation of whether the publication was "educational".

Since Section 422.45(9) is sufficiently definite to provide proper enforcement to the Agency and notice to the taxpayers, it does not violate due process of law. Therefore, the Agency decision cannot be reversed on this ground.

V.

The fifth issue is whether the Iowa tax scheme violates the commerce clause of the United States Constitution. A cardi-

nal rule of the commerce clause is that no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Bacchus Imports, Ltd. v. Dias*, 463 U.S. 268, 104 S.Ct. 3049 (1984). A finding of "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect. *Id.* at 270. Hearst claims that the effect of Iowa Code Section 422.45(9) was to discriminate against out-of-state publishers.

In the case at bar, there is no basis for a finding of a commerce clause violation. In *Bacchus*, the Hawaii Legislature specifically exempted local liquor manufacturers from a 20 percent excise tax. *Id.* at 265. In the present case, the Iowa Legislature has exempted a broad class of the media. Newspapers will be exempted whether they are published in Iowa or published out-of-state. Magazines and other publications will be taxed whether they are published in Iowa or out-of-state. There is no showing that the exemption is at all based on the protection of local business. Therefore, Hearst's commerce clause claim must be rejected.

VI.

The sixth issue is whether Hearst is entitled to attorney fees under 42 U.S.C. Section 1983 and 1988. Section 1988 states that these fees are only awarded to prevailing parties. Since Hearst is not a prevailing party, it would not be entitled to attorney fees, even if Sections 1983 and 1988 applied to this case. Therefore, Hearst's claim under these sections is denied.

VII.

The seventh and last issue is whether the penalty authorized under Iowa Code Section 423.18 for underpayment of tax was properly imposed upon Hearst. The penalty should be imposed unless Hearst shows that the failure to collect and remit the tax was due to "reasonable cause". Iowa Code Section 423.18. Reasonable cause is established by a showing

that Hearst did all that ordinary business care and prudence would demand. *Atlantic Bottling Co. v. Iowa Department of Revenue*, 385 N.W.2d 565, 569 (Iowa 1986). What constitutes ordinary business care and prudence is a determination to be made on the facts of each case. *Id.*

Hearst claims that it had reasonable cause to not pay the tax. The evidence shows that Hearst did not collect the tax because it believed that the tax was discriminatory and in violation of the First and Fourteenth Amendments.

State statutes carry a presumption of constitutionality. Iowa Code Section 4.4; *Iowa Automobile Dealers Association v. Iowa State Appeal Board*, 420 N.W.2d 460 (Iowa 1988). This same presumption also applies in equal protection cases. *Avery v. Peterson*, 243 N.W.2d 630, 633 (Iowa 1976). In the present case, Hearst ignored the presumption of constitutionality in favor of Section 422.45(9). It simply made a determination on its own that the tax was unconstitutional. This determination is not reasonable cause for not paying the tax. Ordinary business care and prudence requires that the taxpayer follow the law. Since the law states that Hearst must collect and pay sales and use tax, Hearst should have collected and paid the tax. Therefore, Hearst has not established reasonable cause.

Since Hearst has not established reasonable cause, a penalty may be imposed for its failure to pay the contested tax. Therefore, the Agency decision is affirmed on this ground.

CONCLUSION

The Court therefore rules that the Agency decision is affirmed in all respects.

RULING

IT IS THEREFORE THE ORDER OF THE COURT that the Decision of the Respondent Agency, be, and the same is hereby affirmed in all respects.

IT IS THE FURTHER ORDER OF THE COURT that the publications of Hearst are not "newspapers" as that term is defined in Section 422.45(9), that the tax on Hearst's publications does not violate the First Amendment, does not violate equal protection, does not violate due process, does not violate the commerce clause, that Hearst is not awarded attorney fees, and that Hearst is liable for the penalty authorized under Section 423.18.

IT IS THE FURTHER ORDER OF THE COURT that petitioner's Petition for Judicial Review, be, and the same is hereby dismissed.

Costs are taxed to the petitioner.

Dated this 6th day of November, 1989.

/s/

JUDGE OF THE FIFTH JUDICIAL DISTRICT OF IOWA

Copies to:

John V. Donnelly/Harold N. Schneebeck
Harry M. Griger/Marcia Mason

APPENDIX C

BEFORE THE IOWA STATE
DEPARTMENT OF REVENUE AND FINANCE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

DOCKET NO. 84-169-6B-A

IN THE MATTER OF

THE HEARST CORPORATION
959 Eighth Avenue
New York, NY 10019

RETAIL USE TAX ASSESSMENT

ORDER OF DIRECTOR UPON REVIEW OF PROPOSED ORDER

On July 21, 1988, the Protestor, The Hearst Corporation, filed an appeal to the Director of the Iowa Department of Revenue and Finance (Director), requesting a review of the Administrative Law Judge's Proposed Order issued July 6, 1988. On July 26, 1988, the Department of Revenue and Finance filed an Answer to Notice of Appeal. On July 26, 1988, the Director issued a notice of review, setting a review date of August 16, 1988. John V. Donnelly, attorney for the Protestor, and Harry M. Griger, attorney for the Department, appeared at the Director's review on August 16, 1988. The Director, having examined the record developed by the parties, hereby issues this Order.

STATEMENT OF THE CASE

The Director hereby adopts and fully incorporates into this Order the Statement of the Case as set forth in the Proposed Order except to include the numbers 22 and 23 in the list of *Protestor's Exhibits* on page 2 (*Exhibits 18, 19, 20, 21, 22, 23, 24*).

FINDINGS OF FACT

The Director hereby adopts and fully incorporates into this Order the Findings of Fact as set forth in the Proposed Order.

CONCLUSIONS OF LAW

The Director hereby adopts and fully incorporates into this Order the Conclusions of Law as set forth in the Proposed Order except to renumber the following paragraphs on page 25: heading number 7 is renumbered as 9, and heading number 8 is renumbered as 10.

CONCLUSION

The Director hereby adopts and fully incorporates into this Order the Conclusion as set forth in the Proposed Order.

IT IS THEREFORE ORDERED that the Administrative Law Judge's Proposed Order issued July 6, 1988, is affirmed and adopted in its entirety. The Protestor failed to meet its burdens of proof on the issues raised.

This Director's decision is the final Order of the Iowa Department of Revenue and Finance.

Issued at Des Moines, Iowa, this 12th day of September, 1988.

IOWA DEPARTMENT OF REVENUE AND FINANCE

BY _____ /s/

G. D. Bair
Director

APPENDIX D

BEFORE THE IOWA STATE
DEPARTMENT OF REVENUE AND FINANCE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

DOCKET NO. 84-169-6B-A

IN THE MATTER OF

THE HEARST CORPORATION
959 Eighth Avenue
New York, NY 10019

RETAIL USE TAX ASSESSMENT

PROPOSED ORDER

This matter came on for evidentiary hearing on October 27, 1987, before the undersigned. Present at the evidentiary hearing on behalf of The Hearst Corporation (Protestor) was its authorized representative and Attorney at Law, John V. Donnelly, along with Harold N. Schneebeck, Attorney at Law. Appearing on behalf of the Iowa Department of Revenue and Finance (Department) was its authorized representative, Harry M. Greiger, Special Assistant Attorney General.

STATEMENT OF THE CASE

On May 22, 1984, The Hearst Corporation filed a protest to the assessment of retail use tax, penalty, interest and fees for the taxable periods of January 1, 1978, through December 31, 1982 (Docket No. 84-169-6B-A). On July 13, 1984, The Hearst Corporation filed a protest to an assessment of corporate income tax, penalty, interest and fees (Docket No.

84-236-2A-A). On May 15, 1985, the Department filed Answers in both cases and requested that the two cases be consolidated and set for hearing.

A Notice of Time, Place and Nature of Hearing in a consolidated case bearing both docket numbers was issued on June 25, 1985. On February 3, 1986, an Order was entered terminating the matter in Docket No. 84-236-2A-A. Subsequently, orders continuing and rescheduling the evidentiary hearing relative to the retail use tax assessment Docket No. 84-169-60-A were entered on February 7, 1986; July 7, 1986; and April 2, 1987. As continued, the matter was scheduled for an evidentiary hearing on October 27, 1987.

On October 8, 1987, Protestor filed an Amended Protest; and on October 22, 1987, the Department filed an Answer to the amended protest. The hearing officer issued an Amended Notice of Time, Place and Nature of Hearing on October 27, 1987, setting forth an amended statement of the issues to be considered. During the hearing the parties filed a Stipulation agreeing that the facts set forth therein (with the exceptions of paragraphs 8, 15, 18, 20, 21, 22, 23, 24 and 25) were true and correct; and that the attached documents should be received into evidence without further foundation. In addition to those exhibits offered as a part of the joint stipulation (Protestor's Exhibits 1 through and including 24; and Department's Exhibits A through and including E), Protestor submitted Exhibit 25, and it was received as a part of the record.

The record in this matter consists of the Stipulation and the following exhibits:

Protestor's Exhibits

Exhibit 1—Copy of Notice of Assessment for Retail Use Tax issued to The Hearst Corporation for the period January 1, 1978, through December 31, 1982.

Exhibit 2—Copy of schedule summarizing assessed retail use tax, penalty and interest.

Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16—Copies of Protestor's publications sold to residents of

Iowa, including Colonial Homes, Cosmopolitan, Country Living, Good Housekeeping, Harper's Bazaar, Motor, House Beautiful, Motor Boating & Sailing, Popular Mechanics, Science Digest, Sports Afield, Town & Country, Connoisseur and Redbook, respectively.

Exhibit 17—Department's Responses to Admission Requests and Answers to Interrogatories.

Exhibits 18, 19, 20, 21, 24—Copies of publications referred to in the Department's response to admission requests and answers to interrogatories, including the following (with publication dates): West Des Moines Express (August 28, 1987); Pella Chronicle (August 14, 1987); Barron's (August 24, 1987); Weekly World News (September 8, 1987); The Sporting News (August 24, 1987); The New York Times (August 27, 1987); and Des Moines Sunday Register (August 23, 1987), respectively.

Exhibit 25—Affidavit of Stanley Gottlieb dated October 19, 1987.

Department's Exhibits

Exhibit A—Answers to Interrogatories which were propounded by the Department to Protestor.

Exhibit B—Copy of printing agreement with Meredith Corporation.

Exhibit C—Copy of fulfillment agreement with Meredith Corporation.

Exhibit D—Copy of portions of a letter dated April 5, 1985, from James Miller to John V. Donnelly.

Exhibit E—Questionnaire regarding activities in Iowa for years 1980, 1981, 1982.

The Protestor's objection to eight (8) paragraphs (numbered 15, 18, 20, 21, 22, 23, 24 and 25) of the Stipulation, on the grounds that they are irrelevant, is overruled. The Department introduced *Exhibit F*, a deposition of Bill Mon-

roe (direct examination) taken on October 14, 1987, and the Protestor introduced the cross-examination as evidence. Both the Protestor's objection to portions of the deposition on direct examination and the Department's objection to portions of the cross-examination, on the grounds that certain questions and answers were irrelevant is overruled. Likewise, the Protestor's objection to questions (appearing in the direct examination) on the grounds that they called for speculation or hearsay is overruled; and the Department's objection to questions asked (during cross-examination) on the grounds that they were not intelligible is overruled. Witkin, EVIDENCE § 302 (1966); McCormick, EVIDENCE § 314 (1954); Department Rule 701-7.17 (17A); Iowa Code § 17A.14 (1). Exhibit F, in its entirety, was received into evidence.

The parties submitted briefs in accordance with a schedule set forth in both their stipulation and a subsequent Order (issued on October 28, 1987); with the last brief filed on April 28, 1988. In a subsequent order (dated May 18, 1988), an extension of time to July 15, 1988, was granted for review prior to issuing the proposed order.

All references to the Iowa Code are references to the Iowa Code (1981). Unless otherwise noted, these same code provisions were in effect at earlier times and at all times pertinent to this matter.

FINDINGS OF FACT

The parties have stipulated to a number of facts set forth in their Stipulation filed on October 27, 1987. Based thereon, the undersigned makes the following findings of fact:

1. The Hearst Corporation (hereinafter sometimes referred to as "Hearst" or "Protestor") is a corporation duly organized and validly existing under the laws of the State of Delaware, with its principal office located in New York, New York.

2. The Iowa Department of Revenue and Finance (hereinafter sometimes referred to as the "Department") is a duly

constituted agency of the State of Iowa. G.D. Bair is the duly appointed Director of Revenue and Finance of the State of Iowa.

3. Under date of April 25, 1984, the Department issued a Notice of Assessment for Retail Use Tax (Exhibit 1) relating to Hearst's alleged retail use tax liability for the period January 1, 1978, through December 31, 1982. This assessment is at issue in this proceeding. The assessment reflects the Department's determination that use tax was due from Hearst by reason of Hearst's failure to collect use tax with respect to certain publications published by Hearst and sold by subscription to Iowa residents. These publications are those designated in Findings of Fact Nos. 7 and 8. Hearst denies that it was responsible for collection and payment to the State of Iowa of use tax with respect to the use in Iowa by subscribers of publications published by Hearst.

4. The Department concedes that the portion of the assessment pertaining to the period prior to October 1, 1987, is barred by Section 422.54, *Code of Iowa*.

5. The Department has agreed that, even if its position is correct, the use tax assessed for the period October 1, 1978, through December 31, 1982, should be reduced to reflect sales for resale, sales made to schools, government agencies and other educational institutions and publications described in paragraph 9 hereof.

6. Among its several activities, Hearst was engaged, during the period at issue, in the publication and sale of certain publications to subscribers and vendors in the United States. Each of the fourteen publications involved in the subject audit had a large subscription circulation throughout the United States.

7. During the period at issue, subscriptions to the following publications published by Hearst were sold to residents of Iowa in the manner described in paragraph 11 hereof: Colonial Homes, Exhibit 3; Cosmopolitan, Exhibit 4; Country Living, Exhibit 5; Good Housekeeping, Exhibit 6; Harper's

Bazaar, Exhibit 7; Motor, Exhibit 8; House Beautiful, Exhibit 9; Motor Boating & Sailing, Exhibit 10; Popular Mechanics, Exhibit 11; Science Digest, Exhibit 12; Sports Afield, Exhibit 13; Town & Country, Exhibit 14.

8. Subscriptions to the publications "Connoisseur," Exhibit 15, and "Redbook," Exhibit 16, were also sold to Iowa residents in the manner described in paragraph 11 hereof. The former was first published by Hearst with its March 1982 issue; the latter, with its August 1982 issue.

9. During the period at issue, the following publications published by Hearst and sold to subscribers who were Iowa residents were printed in Des Moines, Iowa, by Meredith Corporation: Colonial Homes, Harper's Bazaar, House Beautiful and Town & Country. Meredith Corporation delivered these to the United States Post Office in Des Moines, Iowa, for direct mailing to subscribers and vendors within and without Iowa. The Department concedes that Hearst is not required to collect or pay Iowa use tax with respect to these publications.

10. During the period at issue, Hearst also sold the subject publications to wholesalers located in Iowa. These wholesalers then resold the Hearst publications to retailers of the type described in the first sentence of paragraph 13 hereof for resale by the retailers. Hearst did not sell its publications directly to retailers.

11. During the period at issue, Hearst solicited (via U.S. mail) subscription orders for the subject publications from residents of Iowa. Said solicitations originated outside Iowa and were accepted or rejected by Hearst outside Iowa. In the event Hearst accepted the subscription order, it became contractually obligated to send the publication(s) ordered to the customer. At no time did Hearst have any employees in Iowa soliciting subscription orders for its publication(s) from Iowa residents. Hearst received the entire subscription price directly from its Iowa subscribers on this type of sale. However, Hearst did have employees in Iowa soliciting sales from Iowa wholesalers.

12. Except with respect to the publications referred to in paragraph 9 hereof, all the subject Hearst publications sold to Iowa residents in the manner described in the preceding paragraph were printed outside Iowa and mailed as second class mail directly to Iowa subscribers via the United States mail from origin points outside Iowa.

13. The subject Hearst publications are also sold in a variety of retail outlets in the state of Iowa and throughout the United States including, but not limited to, bookstores, grocery stores, drugstores, convenience stores and discount stores. In addition, publishers other than Hearst sell subscriptions to publications which they publish, to residents of Iowa. Retail outlets which sell the subject Hearst publications also sell a variety of publications published by others. A wide variety of publications are sold in Iowa or are sold to Iowa subscribers. These include, for example, magazines, books, newsletters, journals, periodicals, pamphlets and newspapers.

14. All of the fourteen publications referred to in paragraphs 7 and 8 hereof were published monthly, except Colonial Homes, which was published bi-monthly. All fourteen publications relied on the sale of advertising as the major source of their sales for revenues.

15. During the entire period at issue, Hearst owned all of the stock of Periodical Publishers' Service Bureau, Inc. (hereinafter sometimes referred to as "PPSB"), a Delaware corporation with its headquarters located at Sandusky, Ohio. From 1973 to October 31, 1983, PPSB rented an office in Des Moines, Iowa.

16. PPSB employees at its Des Moines, Iowa, office engaged in the telephonic solicitation of orders for publications published by independent publishers as well as for the fourteen publications published by Hearst involved in this proceeding. PPSB sold subscriptions for its own account through contracts between itself and its customers and received payment of the entire subscription price from its customers. Hearst was completely free to accept or reject any order for a Hearst publication subscription received from

PPSB and such acceptance or rejection occurred outside Iowa. If Hearst accepted an order from PPSB, Hearst received from PPSB a portion of the amount paid to PPSB by the subscriber, with PPSB retaining the balance.

17. On September 1, 1982, Hearst acquired all the outstanding stock of Communications Data Service, Inc. (hereinafter sometimes referred to as "CDS"). Prior to September 1, 1982, Hearst owned only nonvoting preferred stock in CDS.

18. For some time prior to September 1, 1982, CDS had offices and employees located in Des Moines, Iowa, and this continued to be true through December 31, 1982.

19. During the period October 1, 1978, through August 31, 1982, CDS performed fulfillment services for Hearst and other publishers unrelated to Hearst. Among the most common of those services performed by CDS were the processing of subscription orders and payments therefor, and processing of customer correspondence (including complaints). CDS performed these fulfillment services with respect to all fourteen Hearst publications involved in this proceeding.

In addition to the foregoing facts set forth by the parties in their Stipulation, the undersigned makes the following Finding of Fact based on Exhibits 3 through 16.

20. All fourteen (14) Hearst publications involved in this proceeding were held out to the public by Hearst as magazines and not newspapers. Hearst publishes fourteen (14) other publications that it holds out to the public as newspapers. Hearst distinguishes between magazines and newspapers; having a separate organization that handles magazines (Hearst Magazine Division), and a separate organization that handles newspapers (Hearst Newspapers Group). Protestor, in a two-page advertisement (appearing on pages 118, 119—Country Living, Exh. 5; pages 130, 131—Colonial Homes, Exh. 3; pages 92, 93—House Beautiful, Exh. 9), set forth its newspapers and its magazines as follows:

Who at Hearst's 14 daily newspapers comes up with the ideas that have made our newspapers "must reading" in communities across the country?

Everyone.

Clockwise from bottom left: 1 *San Antonio (TX) Light*, Betty Benavides, classified advertising manager. 2 *Midland (MI) Daily News*, Jenny Anderson, advertising director. 3 *Beaumont (TX) Enterprise*, James Hebert, circulation district manager. 4 *Los Angeles Herald Examiner*, Bernie Jaram, director of circulation. 5 *Albany (NY) Knickerbocker News*, John Lewis, classified outside sales person. 6 *Midland (TX) Reporter-Telegram*, Sergio Ramirez, pressman. Center (L to R): 7 *Edwardsville (IL) Intelligencer*, William B. Green, publisher. 8 *Plainview (TX) Daily Herald*, Scott Hallman, farm editor.

HEARST IS MORE THAN 135 BUSINESSES INCLUDING MAGAZINES, BROADCASTING, NEWSPAPERS, BOOKS, BUSINESS PUBLISHING AND CABLE COMMUNICATIONS.

MAGAZINES: Colonial Homes • Cosmopolitan • Country Living • Good Housekeeping • Harper's Bazaar • House Beautiful • Motor Boating & Sailing • Popular Mechanics • Redbook • Sports Afield • Town & Country • National Magazine Co., Ltd. (United Kingdom) • Magazine Distribution • Eastern News Distributors • Communications Data Services • International Circulation Distributors • Periodical Publishers Service Bureau **BROADCASTING** TV Stations • WBAL-TV, Baltimore, MD • WCVB-TV, Boston, MA • WDTN-TV, Dayton, Ohio • KMBC-TV, Kansas City, MO • WISN-TV, Milwaukee, WI • WTAE-TV, Pittsburgh, PA • Radio Stations • WBAL-AM, Baltimore, MD • WYYY-FM, Baltimore, MD • WISN-AM, Milwaukee, WI • WLTO-FM, Milwaukee, WI • WHTX-FM, Pittsburgh, PA • WTAE-AM, Pittsburgh, PA • WAPA-AM, San Juan, Puerto Rico **NEWSPAPERS** Albany (NY) Knickerbocker News • Albany (NY) Times-Union • Beaumont (TX) Enterprise • Clearwater (FL) Sun • Edwardsville (IL) Intelligencer • Huron Daily Tribune, Bad Axe, MI • Laredo (TX) Morning Times • Los Angeles (CA) Herald Examiner • Midland (MI) Daily News • Midland (TX) Reporter-Telegram • Plainview (TX) Daily Herald • San Antonio (TX) Light • San Francisco (CA) Examiner • Seattle (WA) Post-Intelligencer • Weeklies in Michigan and Texas.

The many awards and honors for outstanding journalism that our newspapers receive year after year belong to the innovative, talented people in the Hearst Newspapers Group. They have made the Times-Union and the Knickerbocker News in Albany the most important media voices in New York's state capital and the Seattle Post-Intelligencer a respected editorial voice in the Pacific Northwest. From the boldly revitalized San Francisco Examiner to the newly redesigned San Antonio Light, Hearst newspapers are setting standards of excellence all over the country.

Throughout The Hearst Corporation, the innovative ideas of our people...all 12,000 of them working in more than 135 different businesses...have helped us become one of the largest and, we think, one of the best communications companies in the world.

The Hearst Corporation

Clockwise from bottom left: 9 *San Francisco Examiner*, Rob Morse, columnist; 10 *Huron Daily Tribune*, Sandy Hogan, farm reporter; 11 *Clearwater (FL) Sun*, George Graham, editor; 12 *Laredo (TX) Morning Times*, Odie Arambula, editor; 13 *Seattle Post-Intelligencer*, Evelyn Irsani, business reporter; 14 *Albany (NY) Times-Union*, Lois Uttley, executive city editor.

BOOKS/BUSINESS PUBLISHING Arbor House • Avon • Hearst Books • Hearst Marine Books • William Morrow & Co., Inc. • Fielding's Guides • Greenwillow • Morrow Junior Books • Lothrop, Lee & Shepard • Duell • American Druggist • American Druggist Blue Book • Diversion • Electronic Engineers Master Catalog • Electronic Products Magazine • Floor Covering Weekly • Industrial Machinery News • Integrated Circuits Master Catalog • Lens • Lens on Campus • Motor Books • Motor Crash Estimating Guide • Motor Magazine • NARP • Office World News • Retirement Advisors Inc. • Today's Office **CABLE COMMUNICATIONS** Hearst/Argyle Television of California • Los Gatos, CA • Milpitas, CA • Newark, CA • Santa Clara, CA • Saratoga, CA • Cable Programming Networks • Arts & Entertainment (a joint venture between Hearst/ABC Video Services and RCTV) • Lifetime (a joint venture between Hearst/ABC Video Services and Viacom International) **OTHER ACTIVITIES** Cal Graphics • Hearst Advertising Service • Hearst Feature Service • Hearst Metrotone News • King Features Syndicate • King Features Entertainment • Reader Mail, Inc.

CONCLUSIONS OF LAW

1. The Department has jurisdiction of the parties and the subject matter hereof pursuant to §§ 423.16 and 422.54, *Code of Iowa*, and Rule 701-7.8 (17A) of the *Iowa Administrative Code.*

2. The burden of proof is on the party seeking relief from use tax assessment levied by the Department. *Dain Mfg. Co. of Iowa* v. *Iowa State Tax Commission*, 237 Iowa 531, 533, 22 N.W.2d 786, 788 (1946). A Protestor seeking an exemption from taxation has the burden of proving entitlement to that exemption. *Kartridg Pak Co.* v. *Iowa Department of Revenue*, 362 N.W.2d 557, 561 (Iowa 1985). Exemption statutes must be strictly construed, and any doubts must be resolved against exemption and in favor of taxation. *Iowa Movers' & Warehousemen's Assoc.* v. *Briggs*, 237 N.W.2d 759, 769 (Iowa 1976).

3. *Are the subject publications of the Protestor exempt from Iowa use tax pursuant to §§ 422.45(9) and 423.4(4), Code of Iowa, and Predecessor rule to Rule 701-18.42(422, 423) IAC?*

Iowa Code § 423.2 imposes an excess tax on the use in this state of tangible personal property purchased for use in this state; and Iowa Code § 423.4(4) exempted (throughout the period of time under consideration, 1/7/78 through 12/31/82) tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of Iowa Code § 422.45. Iowa Code subsection 422.45(9) exempted from Iowa sales tax "[g]ross receipts from the sales of newspapers or shoppers guides and the printing and publishing thereof, and envelopes for advertising."

Protestor contends that each of the subject publications (set forth in Findings of Fact ¶ 7, 8) were exempt "newspapers" as that term is used in subsection 422.45(9).

Iowa Code § 4.1(2) requires that in the construction of statutes "[w]ords and phrases shall be construed according to the context and approved usage of the language." "Newspa-

pers" is a word of common usage and should be construed in its plain and ordinary significance.

The Hearst Corporation encompasses more than 135 businesses including magazines and newspapers; has received many awards and honors for outstanding journalism in its newspapers; and is in a position to know what constitutes a "newspaper" as that term is commonly understood. The Hearst Corporation has fourteen (14) publications that it holds out to the public as "newspapers." None of the fourteen (14) publications under consideration are held out to the public as constituting "newspapers" within the plain and ordinary significance of that term. Hearst classifies the fourteen subject publications as "magazines." (Finding of Fact 20)

"Newspapers" have been defined as publications, usually in sheet form, intended for general circulation and published regularly at short intervals, containing intelligence of current events and news of general interest. *K-Mart Corp.* v. *South Dakota Dept. of Revenue*, 345 N.W.2d 55 (S.D. 1984); *Caldor, Inc.* v. *Heffernan*, 183 Conn. 566, 440 A.2d 767 (1981); *State ex rel. Bowler* v. *Board of Comrs.*, 106 Mont. 251, 76 P.2d 648; *State ex rel. Yaegar* v. *Ross*, 93 Fla. 1018, 114 So. 373; *Culclasure* v. *Consolidated Bond & Mortg. Co.*, 94 Fla. 764, 114 So. 540; *Times Printing Co.* v. *Star Publishing Co.*, 51 Wash. 667, 99 P. 1040, 16 Ann. Cas. 414; *Re Sterling Cleaners & Dyers*, (CA7th Ill) 82 F.2d 656; 39 Am. Jur. 3, Newspapers and Press Associations § 2; annotation in 16 Ann. Cas. 417, *Turney* v. *Blomstrom*, 87 N.W. 339, 62 Neb. 616.

In *K-Mart Corp.*, *supra*, at 57, the South Dakota Supreme Court reviewed the definition of "newspaper" appearing in the case law of other jurisdictions. The Court indicated:

> All the definitions identify two common characteristics of a newspaper: (1) It is published at short, regular intervals, usually not exceeding a week, and (2) it routinely reports a myriad of topics so that it appeals, at least in part, to a wide spectrum of the general public.

Definitions appearing in dictionaries include: WEBSTER'S COLLEGIATE DICTIONARY 796 (9th edit. 1983)—"[A] paper that is printed and distributed usu. daily or weekly and that contains news, articles of opinion, features, and advertising"; BLACK'S LAW DICTIONARY 940 (5th edit. 1979)—"A publication, usually in sheet form intended for general circulation, and published regularly at short intervals, containing information and editorials on current events and news of general interest."

The Hearst magazines contain detailed articles of special interest to a particular group of people. These magazines do not contain "news" of current events on a variety of topics of general interest. Each magazine contains feature articles in particularly narrow fields, *i.e.*, fashion, homes, furniture, outdoor recreation, boating, etc. The vast amount of non-advertising material consists of feature articles, without regard to time. The articles in the magazines were no more relevant in the month of issuance than they would be in prior or subsequent months. Unlike a newspaper, the magazines did not contain news of current interest to the general public. Unlike a newspaper, the magazines were all published monthly with the exception of one bi-monthly publication, Colonial Homes. The magazines were not in the sheet form usually found in newspapers.

Protestor relies upon *Time Incorporated* v. *Hulman*, 31 Ill. 2d 344, 201 N.E.2d 374 (1964) in support of its position that its magazines were "newspapers" under § 422.45(9). But in this Illinois case, the Court did not hold that newspapers and magazines were identical, but only that the two were to be treated in the same manner under the Illinois tax law, the language of which was not restricted to "newspapers." 201 N.E.2d at 376, 378. The Illinois law, for this reason, was not analogous to Iowa Code § 422.45(9).

A case cited by the Department presents a factually similar situation, *Gasson* v. *Gray*, 49 So. 2d 525, 21 ALR 2d 412 (Fla. 1950). In this case, a Florida statute levying a sales tax upon enumerated articles expressly exempted "newspapers." The question presented was whether a particular publication constituted a newspaper or magazine within the provision of

the sales tax exemption. The Court held that the term "newspaper" had reference to the plain and ordinary significance of the word—the understanding of the word newspaper in general and common usage—and did not refer to or comprehend magazines or periodicals; and that such magazines as Life, Newsweek, and Saturday Evening Post would not be considered "newspapers" under the Florida statute exempting newspapers from sales tax.

Protestor's magazines do not constitute "newspapers" within the context and approved usage of that term.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider the administrative construction of the statute. Iowa Code § 4.6(6). The Department has consistently taken the position that the § 422.45(9) newspaper exemption did not encompass magazines, and that retail sales of magazines are subject to excise tax. A series of declaratory rulings demonstrates that the Hearst special interest magazines have never been construed by the Department as "newspapers" within § 422.45(9). See *Babka Publishing Co.*, Docket No. 76-87-6A-DR, September 28, 1976; *Agri-Marketing Corporation*, Docket No. 80-171-6A-DR, September 19, 1980; *Peg Cass and Bonnie Nath, dba Watch on the Right*, Docket No. 81-97-6A-DR, June 5, 1981; *Iowa Federation of Labor, AFL-CIO*, Docket No. 84-132-6AB-DR, June 22, 1984; all rulings are attached to Exh. 17.

Iowa Code § 422.45(9) was enacted in 1970 by the 63rd General Assembly and was made retroactive to and from January 1, 1970. Implementing this subsection, in 1974 the Department adopted rules appearing in the Iowa Departmental Rules, January 1975 Supplement, as follows:

> 16.40(422) *News distributors and magazine distributors.* News distributors and magazine distributors engaged in intrastate sales of magazines and periodicals in Iowa to vendors who are engaged in part-time distribution of such magazines are deemed to be making sales at retail. The gross receipts from such sales shall be subject to sales tax.

> 16.41(422, 423) *Magazine subscriptions by independent dealers.* The gross receipts from the sale of subscription magazines or periodicals derived by independent distributors or dealers in the state of Iowa who secure such subscriptions as independent dealers or distributors shall be subject to tax.
>
> (These rules currently appear as 701-16.42 (422) and 701-16.43 (422, 423) IAC.)

In 1981, the Department promulgated Department Rule 730-18.42(422, 423) IAC (effective January 28, 1981) as follows, in relevant part:

> 730-18.42 (422, 423) Newspapers, free newspapers or shoppers guides.
>
> 18.42(1) The gross receipts from the sale of newspapers, free newspapers and shoppers guides are exempt from the tax. For purposes of the rule, a newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regular interval and that generally contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest. . .

While Rule 730-18.42 was not effective until January of 1981, the Department's Rules 16.40 and 16.41 (currently 701-16.42 701-16.43 IAC) were in effect at all times relevant to this protest; and both rules and declaratory rulings of the Department imposed tax upon retail sales of magazines, whether by subscription or otherwise.

4. *Do Department rules in effect during the taxable period under consideration constitute an abuse of discretion by the Department, violate the Due Process Clause of the Constitution of Iowa or the United States, or the provisions of Iowa Code § 422.45(1)?*

Hearst maintains that if Department rules deny exemptions from Iowa sales and use tax to any of its subject publications, such rules should be disregarded; that the primary

basis used by the Department to determine if a publication is a newspaper is content, thereby transforming the Department into a quasi-censor. For this reason the rules are arbitrary, capricious and inconsistent with Iowa Code § 422.45 (9), and therefore constitutes an abuse of discretion.

This argument lacks merit. Rule 701-18.42 (422, 433) indicates that a major consideration for a publication to qualify as a newspaper is the printing and distribution "daily, weekly, or at some other and usually short interval . . ." Certainly the Department can look to the classification attributed to the publications by the publisher. The Department's criteria for a "newspaper" appear to reflect the criteria used by the Protestor in its own determination of those publications that were "newspapers."

While the classification of the writing as "news, articles of opinion (editorials), feature, advertising, or other matter regarded as of current interest" is a consideration, the focus is not on the content of the journalism; but rather, the format and frequency of publication. Hearst or anyone else is free, under the rule, to publish and sell whatever content they choose; and to choose whatever format they desire. The rules do not require scrutiny of the content, but rather the format and frequency of publication.

The Iowa state tax scheme, as set forth in the rules, does not differentiate between newspapers based upon their content; nor does it selectively impose tax on some magazines but not others based solely on their content. There is no censorial threat imposed by the rules.

5. *Is Protestor denied freedom of speech and of the press?*

The First Amendment to the Constitution of the United States prohibits the enactment of any law "abridging the freedom of speech, or of the press. . . ," and is applicable to state action pursuant to the Fourteenth Amendment. *Douglas* v. *Jeannette*, 319 U.S. 157, 162 (1943).

Article I, Section 7 of the Constitution of the State of Iowa provides identical guarantees:

> Liberty of speech and press. Sec. 7. Every person may speak, write, and publish his sentiments on all subjects,

> being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. . .

The gravamen of Hearst's First Amendment argument is that as long as newspapers are tax exempt, all other publications must be tax exempt. The Department maintains that such an "all or nothing" approach for taxation or tax exemption is not constitutionally required.

In *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250, 80 L. Ed. 660, 668, 56 S. Ct. 444 (1936), the Court held that the First Amendment "is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. . . The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information." In that case, the State of Louisiana imposed a license tax of 2% on the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to tax. Both the brief and the argument of the publishers emphasized the events leading up to the tax and the contemporary political climate in Louisiana. All but one of the large newspapers subject to tax had attacked Senator Huey Long and circulars distributed by Long and the Governor to each member of the legislature described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying." Although the Court's opinion did not describe this history, it stated, "[The taxi] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information." 297 U.S. at 250, 80 L. Ed. 660, 56 S. Ct. 444. Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See *Minneapolis Star* v. *Minnesota Commission of Revenue*, 460 U.S. 575, 7.5 L. Ed. 2d 295, 103 S. Ct. 1365 citing to T. Emerson, *The System of Freedom of Expression*, 419 (1970); L. Tribe, *American Constitutional Law*, 592, n.8, 724, n.10 (1978).

Protestor does not contend, nor has it presented any evidence to suggest, that the Department had any improper censorial goal.

As provided in *Minneapolis Star*, 460 U.S. at 581, 75 L. Ed. 2d at 302, "Clearly, the First Amendment does not prohibit all regulation of the Press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." In this case, a Minnesota tax statute provided for a special use tax on publications, assessing the tax on the cost of the ink and paper used in producing the publications. The statute exempted the first $100,000 of such costs in any calendar year from the use tax. Additionally, publications were exempted from the State's general sales tax. The United States Supreme Court held that the special use tax violated the First Amendment both by singling out the press for the special use tax, and by targeting the tax against only a small group of newspapers for the use of the exemption. (In *Minneapolis Star*, the Court held that they did not impugn the motives of the Minnesota Legislature in passing the tax, and stated, "Illicit legislative intent is not the sine qua non of a violation of the First Amendment.")

Iowa Code §§ 422.43 and 423.2 and implementing rules do not single out the press. They impose a sales tax on all retail sales, or they impose an alternative use tax on "every person" using tangible personal property purchased for use in this state. The Iowa tax scheme does not target a group of magazine publishers for assessment of the tax; nor does it target a group of newspapers for the exemption.

In *Arkansas Writers' Project, Inc.* v. *Ragland*, ____ U.S. ____, 107 S. Ct. 1722 (1987), the State of Arkansas had a statutory scheme that imposed a sales tax on general interest magazines, but exempted religious, professional, trade, and sports magazines. The U.S. Supreme Court held that the sales tax violated the free press guarantee of the First Amendment to the United States Constitution because the state scheme differentiated between magazines based upon the content of their messages. As provided by the Court at 95 L. Ed. at 219,

> On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press. While we indicated in Minneapolis Star that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible, 460 US, at 586, and n 9, 75 L Ed 2d 295, 103 S Ct 1365, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax; in that respect, it operates in much the same way as did the $100,000 exemption to the Minnesota use tax. Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in Minneapolis Star.

The situation now under consideration is different from the facts presented in *Arkansas Writers'*. The Iowa use tax law and implementing rules do not differentiate between general interest magazines and special interest magazines, but apply to all magazines. The regulations do not permit the Department to discriminate against certain magazines on the basis of the content of the message.

(In *Arkansas Writers'* the Supreme Court specifically declined to decide whether the differential treatment of newspapers and magazines was unconstitutional absent the State's selective application of its sales to some magazines and not others.)

The Department in its Brief cites as relevant, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983). In this case, the Supreme Court reviewed the Internal Revenue Code provision that granted tax exemptions to certain nonprofit organizations "no substantial part of the activity of which is carrying on propaganda, or otherwise attempting to influence legislation." See § 501(c)(3), Internal Revenue Code of 1954. The Supreme Court held in relevant parts at 76 L. Ed. 2d at 136, 137:

> Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of the portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

The taxpayer (Taxation With Representation) argued that Congress' decision not to subsidize its lobbying violated the First Amendment. The Supreme Court rejected their argument, holding (76 L. Ed. 2d at 138):

> [W]e conclude that Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment activities. The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to " 'ai[m] at the suppression of dangerous ideas.' " (Citing to Cammarano v. United States. 358 U.S. 498, 3 L.Ed.2d 462, 79 S.Ct. 524 [1959]) We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.

The Court in *Regan* held that a tax exemption for some speech did not dictate a tax exemption for all speech. In the same way, the Iowa legislature can subsidize newspapers by tax exemption, but is not required to also subsidize magazines as long as the Iowa law and regulations do not formulate obstacles to those who exercise their rights under the First Amendment; or do not treat the same situations differently; do not engage in censorial conduct; or do not target a

small group for taxation. None of that conduct is present in this case.

Protestor has not sustained its burden of proving it has been denied freedom of speech and of the press. The Iowa tax scheme which exempts newspapers, but not magazines, from the generally applicable excise tax is not the type of tax that violates the First Amendment. The state is not required to subsidize all published media merely because it chooses to subsidize newspapers.

6. *Is Protestor being denied equal protection of the law?*

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the law." The equal protection clause of the Iowa Constitution (Art. 1, § 6) places substantially the same limitation on state legislation as does the equal protection clause of the Fourteenth Amendment. *City of Waterloo* v. *Selden*, 251 N.W.2d 506, 509 (Iowa 1977).

Hearst challenges the "newspaper" exemption in § 422.45(9), which classifies newspapers as exempt from sales and use tax while other publishers are denied tax exempt status; and contends that because its First Amendment rights are being impinged upon, and such rights are fundamental, the classifications are subject to strict judicial scrutiny. Furthermore, according to Protestor, the presumption of constitutionality afforded state statutes (see *Iowa Industrial Commission* v. *Davis*, 286 N.W.2d 658, 661 [Iowa 1979]) is not applicable.

The legislative classification between newspapers and magazines is supported by *Regan*. In *Regan* the Court (quoting from *Madden* v. *Kentucky*, 309 U.S. 83 [1940]) stated at 547:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification

> has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

In *Regan* the Supreme Court held that congressional selection of particular entities or persons for entitlement to tax deduction and exemptions are "a matter of grace [that] Congress can, of course, disallow . . . as it chooses," citing to *Commissioner* v. *Sullivan*, 356 U.S. 27, 2 L. Ed. 2d 559, 78 S. Ct. 512 (1958). The Court specifically stated:

> These are scarcely novel principles. We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. (Citations and references omitted.)

Under *Regan*, Iowa laws and rules indicating that the state will not subsidize magazines by tax exemption would not invoke the strict scrutiny standard for equal protection analysis; rather, in order to justify such differential taxation, the state must show that the statute and rules have some "rational basis." See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955); *California Medical Assn.* v. *FEC*, 453 U.S. 182, 69 L. Ed. 2d 567, 101 S. Ct. 2713 (1981).

In this case, there has been no infringement of Hearst's First Amendment rights. But even if this were not the case, the Department has presented evidence that the statute and

rules had a rational basis. Taxation of carrier sales would be unworkable and the newspaper company could not be required to collect tax on carrier sales. These problems do not exist with respect to the sale of magazines and other publications. Exhibit F. As provided by the Supreme Court in *Gasson* v. *Gay*, 49 So. 2d at 526, "The classification made by the legislature, so as to tax magazines and periodicals and exempt newspapers, is reasonable and valid and does not offend either the state or federal constitutions. . ."

7. *Is Protestor being deprived of its liberty and property without due process of law?*

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in part, "nor shall any State deprive any person of life, liberty, or property without due process of law;". Article I, Section 9 (last clause), of the Constitution of the State of Iowa provides the same guarantees.

All of the provisions of the First Amendment have been made applicable to the states through the due process provision of the Fourteenth Amendment, including freedom of speech and of the press. *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925); *Near* v. *Minnesota*, 283 U.S. 697, 701 (1931). As set forth in the foregoing Conclusions of Law, the imposition of Iowa use tax on Protestor's magazines does not deprive it of its fundamental First Amendment rights. Protestor contends, however, that it has been deprived of property without due process because § 422.45(9) "is so vague, indefinite and uncertain that it cannot be determined by accepted rules of construction what publications are included within the parameters of that section."

The hearing officer has no authority to declare § 422.45(9) void for vagueness, to the extent that Hearst's challenge is to the constitutionality of the legislation and not the constitutional applicability of legislation to particular facts and constitutionality of the legislation. 3K. Davis, *Administrative Law Treatise*, § 20.04 (1958); *Matters* v. *City of Ames*, 219 N.W.2d 718, 719 (Iowa 1974); *Salsbury Laboratories* v. *DEQ*, 276 N.W.2d 830, 836 (Iowa 1979).

To the extent that the challenge is to the applicability of the legislation to the facts of this case, Hearst itself classified, for public consumption, its various publications as either newspapers or magazines. The term "newspapers" was utilized by Hearst with precision, certainty and clarity. Finding of Fact 20. Similarly, "magazines" is used by Hearst definitively and without reservation as regards each of the subject publications: "Motor Boating & Sailing . . . the indispensable monthly magazine . . .", p. 167, Exh. 10; "Harpers Bazaar, America's Fashion Magazine for the Thinking Woman", business reply mail, attached to p. 164, Exh. 7; "Motor Magazine—The Magazine for the Responsible Automotive Technician", p. 3, Exh. 8; "In future issues you will have an opportunity to participate in the largest consumer sweepstakes ever conducted by an outdoor magazine. A centennial issue which promises to be the biggest, most colorful and best-written outdoor magazine ever published", Sports Afield, p. 107, Exh. 13; "Connoisseur, the magazine about enemies of 'the good.' The magazine about perfection. The magazine about you and quality . . .", opposite p. 180, Exh. 14 (see also insert, opposite p. 114, Exh. 15); "Good Housekeeping—The Magazine America Lives By", p. 8, Exh. 6; "Cosmopolitan—It's the magazine that speaks your language about all that's important to you . . .", order attachment, opposite p. 112, Exh. 4; "Most people probably wouldn't think of POPULAR MECHANICS as an 'arty' magazine . . . . frankly, we like to think of ourselves as a bright, contemporary, visually exciting magazine.", Editor's notes, p. 6, Exh. 11.

8. *Does imposition of the Iowa use tax in this case violate the commerce clause?*

Protestor argues that the practical effect of the Iowa sales and use tax scheme is to discriminate in favor of local (Iowa) print media and against foreign (non-Iowa) source print media which provide competition in the fight for the subscriber dollar.

"No state, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce

. . . by providing a direct commercial advantage to local business." *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329 (1977) [quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959)]. However, the Commerce Clause is not violated when state taxation affects a particular classification, as long as the classification distinctions are not based upon in-state or out-of-state criteria. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 277, 57 L. Ed. 2d 197, 207, 98 S. Ct. 2340 (1978) (n.12); *Commonwealth Edison Company* v. *Montana*, 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981).

The Iowa tax structure does not base the § 422.45(9) exemption upon any in-state or out-of-state criteria. The Hearst newspapers are the subject of the tax exemption regardless whether they are published, printed, or sold in Iowa or outside of Iowa. The Hearst magazines are the subject of taxation, regardless whether they are published, printed, or sold in Iowa or outside of Iowa.

Protestor's contention that § 422.45(9) discriminates against non-Iowa media and favors local commerce over interstate commerce lacks merit.

9. *Is Hearst entitled to recover attorney fees?*

Hearst asserts that its constitutional claims entitle it to recover its attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988. The threshold question presented is the existence, or lack thereof, of subject matter jurisdiction in a state administrative hearing to determine issues and grant relief in matters arising under 42 U.S.C. §§ 1983 and 1988. In order for action to be brought under those provisions, available administrative remedies must first be exhausted. *Stevenson* v. *Board of Education* (1970, CA 5 Ga.) 426 F.2d 1154, *cert. den.*, 400 U.S. 957, 27 L. Ed. 2d 265, 91 S. Ct. 355; *Buffalo Teachers' Federation, Inc.* v. *Helsby* (1977, S.D. NY) 435 F. Suppl. 1098; *Kramer* v. *Horton* (1986) 128 Wis. 2d 404, 383 N.W.2d 54. 42 U.S.C. §§ 1983 and 1988 do not confer jurisdiction to

administrative tribunals to grant relief for deprivation of civil or constitutional rights.

10. *Should a penalty be imposed upon Protestor?*

Iowa Code § 423.18(1) provides for a penalty for failure to timely remit use tax unless it is shown that failure to remit the tax on or before the due date was due to reasonable cause." What constitutes "reasonable cause" was explored by the Court in cases arising subsequent to the assessment period under consideration. *Atlantic Bottling Co.* v. *Iowa Dept. of Revenue*, 385 N.W.2d 565, 569 (Iowa 1986); *Armstrong's Inc.* v. *Iowa Department of Revenue*, 320 N.W.2d 623, 629 (Iowa 1982). As provided in *Armstrong*, *id.* at 629, "reasonable cause" exists if a taxpayer shows that it did all that ordinary business care and prudence would demand; and what constitutes ordinary business care and prudence is a determination to be made on the facts of each particular case.

Before the 1982 *Armstrong* decision, administrative decisions of the Department of Revenue consistently held that in the absence of Iowa Supreme Court cases defining "reasonable cause," the proper construction was to be gleaned from cases interpreting IRC Section 6651(a)(1). See In the Matters of: *Dubuque Bank & Trust Co.*, Docket No. 78-42-2A-PI (Nov. 9, 1978); *M & G Air Travel*, Docket No. 82-321-6B-A. I.R.C. § 6651(a) sets out a penalty for failure to file returns or to pay tax, ". . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect, . . ." Two separate and distinct showings had to be made under § 6651(a). This separate, additional showing of no willful neglect would not destroy the value of the courts' definition of reasonable cause in cases involving a mistake of law or good-faith belief. In the case of *P. Dougherty Company* v. *C. I. R.* (1947) 159 F.2d 269, at p. 273, the court states that it has been held that an innocent mistake by a taxpayer which leads him to believe that he is not required to file a return is of itself insufficient to show that his failure was due to reasonable cause within the meaning of the statute, and the court cited many cases as authority for that statement. In the

case of *Norton* v. *United States* (1977) 551 F.2d 821 at p. 827, the court held that reasonable cause for failure to pay tax existed to the extent that taxpayer could nevertheless, unable to pay the tax or would have suffered undue hardship if he paid on the due date. The burden of proving that the failure was due to reasonable cause and not to willful neglect was on the taxpayer. In the case of *R. A. Henningson*, 243 F.2d 954 (1957), the court upheld the assessment of penalties and found that uninformed and unsupported belief or an innocent mistake did not constitute reasonable cause.

This contention is further supported in *Olga de Belaieff* v. *Commissioner*, 15 TCM 1426, 1430 (1956), which cited *Fraternal Order of Civitans of America*, 19 T.C. 240 [Dec. 19, 294], "wherein it was held that sincere belief on the part of the taxpayer that it was exempt did not constitute reasonable cause under the statute."

During the assessment period 1978 through 1982 the Department had in effect Rule 730-12.11, IAC, as follows, in relevant part:

> A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he or she *exercised ordinary business care and prudence* in providing for payment of his or her liability and was nevertheless either *unable to pay the tax or would suffer an undue hardship* if he or she paid on the due date. (Emphasis added.)

Protestor presents as a reason for failing to collect and remit use tax, its opinion that the tax was "discriminatory and in violation of the First Amendment and the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States and various U.S. Supreme Court cases." Exh. 25. (Protestor does not indicate what cases it relied on; major cases which Protestor relied on in its brief to support this contention were decided after the 1978-1982 tax periods under consideration, including *Minneapolis Star & Tribune Co.* [1983], *Arkansas Writers'*

Project [1987], *Louisiana Life, Ltd.* v. *McNamara*, 504 So. 2d 900 [LA 1987].)

Ordinary care and prudence dictate that a taxpayer comply with the law until that law has been declared invalid by the courts. Protestor has failed to sustain its burden of establishing that it did all that ordinary business care and prudence would demand.

CONCLUSION

The Protestor has failed to show entitlement to an exemption from use tax; or that the Protestor has been deprived of any constitutional rights as guaranteed by the United States and Iowa Constitutions; or that reasonable cause exists for waiver of the penalty. The Department's assessment of retail use tax, penalty, interest, and fees is affirmed; but the Department has agreed to reduce the assessment to reflect sales for resale, sales made to schools, government agencies and other institutions described in Finding of Fact No. 9.

No affidavit has been filed by the Protestor under Department Rule 701-7.9(17A) IAC seeking the deletion of identifying details in this case.

Pursuant to Iowa Code § 17A.15(3), this Proposed Order becomes the final order of the Iowa Department of Revenue and Finance without further proceeding unless there is an appeal to, or review on motion of, the Director within thirty (30) days of the issuance of this Proposed Order. See Department Rule 701-7.17 (17A), IAC.

Issued at Des Moines, Iowa, this 6th day of July, 1988.

IOWA DEPARTMENT OF REVENUE AND FINANCE

By /s/
Elizabeth Duncan
Administrative Law Judge

APPENDIX E

IN THE SUPREME COURT OF IOWA

No. 89-1863

THE HEARST CORPORATION,

Appellant,

—vs.—

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellee.

ORDER

After consideration by the court, en banc, appellant's Petition for Rehearing in the above-captioned matter is hereby overruled and denied.

Done this 18th day of October, 1990.

THE SUPREME COURT OF IOWA

/s/

Arthur A. McGiverin
Chief Justice

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APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Federal constitutional provisions, Iowa statutes, and Iowa regulation involved in this case are set forth, in relevant part, below.

U.S. Const. Amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, Section 1

> . . . No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 422.43 Code of Iowa (1977) Tax Imposed

> There is hereby imposed a tax of three percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users . . .

Section 422.45 Code of Iowa (1977) Exemptions

> There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:
>
> * * *
>
> 9. Gross receipts from the sales of newspapers, free newspapers or shoppers guides and the printing and publishing thereof.
>
> * * *

(the words "and envelopes for advertising" were added to the end of subparagraph 9, effective July 1, 1979)

Section 423.2 Code of Iowa (1977) Imposition of Tax

An excise tax is imposed on the use in this state of tangible personal property purchased for use in this state, at the rate of three percent of the purchase price of the property. . . .

Section 423.4 Code of Iowa (1977) Exemptions

The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this chapter:

* * *

4. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of Section 422.45 . . .

---

730 Iowa Admin.Code 18.42(1) (1981) Newspapers, free newspapers, or shoppers guides.

The gross receipts from the sale of newspapers, free newspapers and shoppers guides are exempt from the tax. For the purposes of this rule, a newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that generally contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest.

(the word "generally" was deleted from the second sentence effective April 14, 1982)